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A TREATISE

ON THE

LAW OF RAILROADS

CONTAINING A CONSIDERATION OF THE ORGANIZATION, STATUS AND POWERS OF RAILROAD CORPORATIONS, AND OF THE RIGHTS AND LIABILITIES INCIDENT TO THE

LOCATION, CONSTRUCTION AND OPERATION OF RAILROADS

AND ALSO THE

DUTIES, RIGHTS AND LIABILITIES OF RAILROAD COMPANIES

AS CARRIERS

UNDER THE RULES OF THE COMMON LAW AND THE INTERSTATE COMMERCE ACT

BY

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Authors of Roads and Streets, Appellate Procedure and General Practice

In Four Volumes

VOLUME I

INDIANAPOLIS AND KANSAS CITY
THE BOWEN-MERRILL COMPANY
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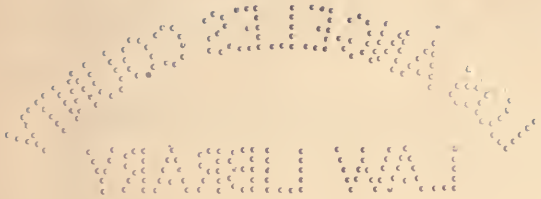

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PREFACE.

A treatise on the law of railroads necessarily covers a wide field, for the relations in which railroad companies must be considered are manifold and diverse. The law of railroads has strikingly developed and greatly expanded within the last few years, and while it can not, perhaps, be said with strict accuracy that new principles have come into existence, yet it can be justly said that the application of old principles to new situations, relations and conditions has wrought radical changes and introduced new and important rules. While the creative power may not have been at work, that of evolution has been constantly and vigorously exerting its influence. Our purpose has been to consider general principles, to study and record the progress of the law and the results of the process of evolution. We have sought to find and give the modern law upon the principal subject and its allied topics.

The general plan of our work has been to gather and state the rules declared by the adjudged cases, and to illustrate them by reference to the decisions which seem to best declare the rules and most clearly show their application. We have quoted from the decision in instances where the judges have laid down the rules with clearness and applied them with accuracy. We have cited cases for the twofold purpose of illustrating our views and of placing conveniently at hand the rules of law and supporting decisions. Where we have found conflict, as we have often done, we have endeavored to ascertain and state the rule which fundamental principles support.

We have endeavored to cite all the authorities upon contro-

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verted questions as well as those illustrating particular or peculiar applications of familiar general rules. It would not have been difficult to cite a multitude of additional authorities in support of general rules, but it is believed that the citations are copious enough for all practical purposes, and that the number of cases is far in excess of that to be found in any other work upon the subject. In selecting authorities in support of general principles we have, as a rule, chosen decisions of the federal courts and the leading cases and more recent decisions in each state; but we have also cited the relevant decisions of the English and Canadian courts.

We have considered and discussed many matters, not ordinarily considered in text-books upon the subject of railroads, which we have found important in our practice as attorneys both for and against railroad companies. We have thought that such a course was essential to a complete and systematic treatment of the subject as well as necessary to make the book one of practical utility. The consideration of these incidental matters not only adds, as we believe, to the usefulness of the book as one of reference, but also adds to its value as a treatise insomuch as the discussion of the incidental topics serves to exhibit the principal topics in stronger and clearer light.

For more than four years intelligent and painstaking work was put upon these volumes by Evans Woollen, Esq., of the Indianapolis Bar, a lawyer of learning and ability and admirably equipped for the work done by him. We gratefully acknowledge our obligations to him for the valuable assistance given us.

BYRON K. ELLIOTT,
WILLIAM F. ELLIOTT.

Indianapolis, January, 1897.

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THE CORPORATION.

CHAPTER I.

DEFINITIONS.

§ 1. Railroad companies—Definition and characteristics.
2. Dual nature of railroad corporations.
3. "Railroad" or "railway."
4. What are railroads.
§ 5. "Railroad track"—"Right of way"—"Road-bed" and "roadway."
6. Street railways.
7. Elevated railroads.
8. Electric railroads.
9. Cable railroads.

§ 1. Railroad companies—Definition and characteristics.—Railroad companies are companies or associations organized for the purpose of constructing, maintaining and operating railroads.[1] An individual or a partnership may own and op-

[1] Contractors engaged in constructing a railroad are not, however, within the meaning of a statute requiring "railroad companies" to sound a whistle. Griggs *v.* Houston, 104 U. S. 553. But a company running gravel trains in the construction of a railroad is "operating a railroad" within the meaning of the Iowa code, § 1307. McKnight *v.* Iowa, etc., R. Co., 43 Iowa 406. And the interest coupons of a corporation authorized to condemn land and to construct and operate a railroad in addition to carrying on a mining and manufacturing business were held taxable under an act of congress providing for the taxation of the interest coupons of railroads. Kentucky Improvement Co. *v.* Slack, 100 U. S. 648. See, also, Randolph Co. *v.* Post, 93 U. S. 502; International Coal Co. *v.* Cape Breton County, 22 Canada S. C. R. 305; State, Duluth, etc., Co. *v.* Eleventh Judicial Court, 54 Minn. 34, 55 N. W. R. 816. So, a trust company operating a railroad for the benefit of the bondholders may be held liable for killing stock under a statute applying in terms to "railroad corporations." Union Trust Co. *v.* Kendall, 20 Kan. 515. But the fact that the charter of a lumber company authorized it to build a railroad as an incident to its business was held, in another case, not to make it a railroad company within a statute making railroad companies liable for injuries to employes. Ellington *v.* Beaver Dam Lumber Co., 93 Ga. 53, s. c. 19 S. E. R. 21. It has also been held that a "union depot and railroad company" is not an ordinary railroad company and that it need not be incorporated under the statute providing for the incorporation of railroad companies, but might be incorporated under the general law

erate a railroad,[1] except, perhaps, where the statute requires that all railroads shall be owned or operated by corporations.[2] And it seems that an individual, as well as a corporation, may, with legislative authority, exercise the right of eminent domain.[3] If he does undertake to maintain and operate a railroad without legislative authority it will be at the risk of being held liable for maintaining a nuisance or for injuries caused by the operation of the road,[4] and he will, at least in the absence of legislative authority, have none of the special powers and immunities granted only to corporations. Although, as we have seen, an individual may construct and operate a railroad, yet, with few exceptions, railroad companies are corporations cre-

providing for the incorporation of ordinary private corporations. People *v.* Cheeseman, 7 Colo. 376, s. c. 16 Am. & Eng. R. R. Cases 400. But see Union Depot Co. *v.* Morton, 83 Mich. 265.

[1] Stewart's Appeal, 56 Pa. St. 413; Bank of Middlebury *v.* Edgerton, 30 Vt. 182; Henderson *v.* Ogden City Ry. Co., 7 Utah 199, 26 Pac. R. 286, s. c. 46 Am. & Eng. R. R. Cases 95; David *v.* Kingscote, 6 M. & W. 174; *In re* Kerr, 42 Barb. (N. Y.) 119. See, also, Budd *v.* Multnomah, etc., Co., 15 Ore. 404; People *v.* Brooklyn, Flatbush, etc., Co., 89 N. Y. 75; Southern Pac. R. R. Co. *v.* Orton, 32 Fed. R. 457. If he holds himself out to the public as a common carrier he will be subject, it seems, to the law governing common carriers. Bank of Middlebury *v.* Edgerton, *supra*.

[2] In the case of the Commonwealth *v.* Vrooman, (Pa.) 25 L. R. A. 250, it was held that the legislature might rightfully require all persons desiring to conduct the business of insurance "to obtain a charter of incorporation." If the doctrine of the case cited be sound, which we confess we doubt, then there can be no doubt that the legislature may require that the business of owning and operating railroads be conducted by corporations. The business of operating a railroad is unquestionably "affected with a public interest," and there is reason for the conclusion that where an association undertakes to conduct such business the legislature may require it to be incorporated. But the mere fact that the right to construct and operate railroads and to condemn and obtain the right of way therefor is given by statute to railroad corporations does not prevent an individual from constructing and operating a railroad on his own land or the land of another from whom he has purchased the right of way. Moran *v.* Ross, 79 Cal. 159, s. c. 21 Pac. R. 547, 39 Am. & Eng. R. R. Cas. 1.

[3] Moran *v.* Ross, 79 Cal. 159, 39 Am. & Eng. R. R. Cas. 1, 21 Pac. R. 547; Coe *v.* Columbus, etc., R. R. Co., 10 Ohio St. 372, s. c. 75 Am. Dec. 518, 529; Brown *v.* Beatty, 34 Miss. 227. But an individual may not take by transfer from a railroad corporation the charter right to build a railroad and to invade the premises of others. Stewart's Appeal, 56 Pa. St. 413. See, also, Finney *v.* Somerville, 80 Pa. St. 59.

[4] Regina *v.* Train, 3 F. & F. 22; Wilson *v.* Cunningham, 3 Cal. 241.

ated either by special charter or organized under general laws. They are given certain prerogative franchises and privileges for public purposes, in return for which the state retains a right of supervision and control in excess of that exercised over purely private corporations. In the very grant of the franchise there is, in effect, an implied condition that it shall be held as a public or *quasi* public trust.[1] Although the stockholders may derive a private benefit and gain therefrom, yet railroads are for the use of the public, and municipal aid may be authorized and granted to such corporations for the purpose of constructing their roads as in the case of any other public work.[2] This outline will serve to show in a general way the peculiar nature of railroad corporations, but their legal status will be more fully considered in a subsequent chapter.

§ 2. **Dual nature of railroad corporations.**—A railroad company or corporation is usually regarded as a private corporation, and justly so, as contrasted with a strictly public corporation such as a city, county, township or the like governmental subdivision, but it is not a private corporation in the strict sense that an ordinary business corporation is, for it is charged with duties of a public nature that distinguish it from a purely and strictly private corporation. In many respects a railroad corporation is a private corporation in all that the

[1] Messenger *v.* Pennsylvania R. R. Co., 36 N. J. L. 407, s. c. 13 Am. Rep. 457, 463, affirmed in 37 N. J. L. 531, s. c. 18 Am. R. 754, 759. See, also, National Docks R. R. Co. *v.* Railroad Co., 32 N. J. Eq. 755.

[2] Northern Pac. R. R. Co. *v.* Roberts, 42 Fed. R. 734, s. c. 31 Am. & Eng. Corp. Cases 642, and authorities there cited; Bank of Rome *v.* Village of Rome, 18 N. Y. 38; People *v.* Mitchell, 35 N. Y. 551; Chicago, etc., R. R. Co. *v.* Smith, 62 Ill. 268; Davidson *v.* County Commissioners, 18 Minn. 482; Leavenworth County *v.* Miller, 7 Kan. 479; Sharpless *v.* Mayer, 21 Pa. St. 147, s. c. 59 Am. Dec. 759, and note; Walker *v.* Cincinnati, 21 Ohio St. 14, s. c. 8 Am. R. 24; Gelpcke *v.* Dubuque, 1 Wall. (U. S.) 175; Pine Grove Tp. *v.* Talcott, 19 Wall. (U. S.) 666; Lafayette, Muncie and Bloomington R. R. Co. *v.* Geiger, 34 Ind. 185; Brocaw *v.* Board, 73 Ind. 543; Pittsburgh, C., C. & St. L. Ry. Co. *v.* Harden, (Ind.) 37 N. E. R. 324, 15 Am. & Eng. Ency. of Law 1242, 2 Beach Pub. Corp., § 896. But see People *v.* Salem, 20 Mich. 452, s. c. 4 Am. R. 400; Ellis *v.* Northern Pac. R. R. Co., 77 Wis. 114, s. c. 31 Am. & Eng. Corp. Cases 661; Morrill *v.* Smith Co., (Tex.) 36 S. W. R. 56.

term implies, but in other respects it differs from a corporation upon which no public duties are imposed. The property of a railroad company used for the transportation of passengers and articles of commerce is devoted to a public use. The doctrine of Chief Justice Hale that, "when private property is affected with a public interest it ceases to be *juris privati* only," applies to a railroad corporation.[1] It is not to be understood, however, from the fact that the property of a railroad company is devoted to a public use or "affected with a public interest," that it can be treated as a public corporation; on the contrary, a railroad corporation is classed as a private corporation and its strictly private rights are as much beyond legislative control as are the rights of a purely private corporation.[2] While a railroad corporation may for most purposes be regarded as a private corporation there is, nevertheless, as we have seen, a side to it, as one may say, that is public. As will hereafter

[1] Chicago, etc., Co. *v.* Iowa, 94 U. S. 155; Georgia, etc., Co. *v.* Smith, 128 U. S. 174; Peik *v.* Chicago, etc., Co., 94 U. S. 164; Munn *v.* Illinois, 94 U. S. 113, 126; Railroad Commission Cases, 116 U. S. 307; Newburyport, etc., Co. *v.* Eastern R. R. Co., 23 Pick. (Mass.) 326; Holladay *v.* Patterson, 5 Or. 177; Whiting *v.* Sheboygan, etc., Co., 25 Wis. 167; State *v.* McIver, 2 So. Car. 25; Mayor *v.* Baltimore, etc., Co., 21 Md. 50; McCoy *v.* Cincinnati, etc., Co., 13 Fed. R. 3, s. c. 6 Am. and Eng. Ry. Cases, 621; State *v.* Boston, etc., Co., 25 Vt. 433; Olcott *v.* Supervisors, 16 Wall, 678. The principle stated in the text applies, as is well known, to many other kinds of corporations. Hockett *v.* State, 105 Ind. 250, s. c. 55 Am. R. 201; City of Rushville *v.* Rushville, etc., Co., 132 Ind. 575, 584; State *v.* Ironton, etc., Co., 37 Ohio St. 45; City of Zanesville *v.* Zanesville, Gas. Light Co. 47 Ohio St. 1, s. c. 23 N. E. R. 55. The later decisions of the Supreme Court of the United States modify the doctrine asserted in Munn *v.* Illinois, 94 U. S. 113, but we do not understand that they deny the rule that railroads are affected with a public interest and are subject to legislative regulation and control. Chicago, etc., Co., *v.* Minnesota, 134 U. S. 418; Brass *v.* North Dakota, 153 U. S. 391; Reagan *v.* Farmers, etc. Co., 154 U. S. 362; Covington, etc., Co. *v.* Kentucky, 154 U. S. 204.

[2] Pierce *v.* Commonwealth, 104 Pa. St. 150; Thorpe *v.* Rutland, etc., R. R. Co., 27 Vt. 140, s. c. 62 Am. Dec. 625; Ohio, etc. R. R. Co. *v.* Ridge, 5 Blackf. (Ind.) 78; Sweatt *v.* Boston, etc., R. R. Co., 3 Cliff. (U. S.) 339; Sloan *v.* Pacific R. R. Co., 61 Mo. 24; Tinsman *v.* Belvidere, etc., R. R. Co., 26 N. J. L. 148. And the fact that the state owns some of the shares of a particular corporation does not make it a public corporation. Marshall *v.* Western R. R. Co., 92 N. Car. 322; Moore *v.* Schoppert, 22 W. Va. 282.

appear the element of public interest which enters into all railroad corporations distinguishes them from purely private corporations to such an extent as to lead to important results.

§ 3. **"Railroad" or "railway."**—The words "railroad" and "railway" are practically synonymous, and are ordinarily to be treated as without distinction of meaning.[1] Thus, in one of the cases cited, it is said: "'Rail*road*' and 'rail*way*' are used interchangeably. They are as nearly synonymous as any two words in the language. Though the latter name was, in strict accuracy, the corporate name of the company intended, there can be no doubt that the other name is used as designating the same company."[2] So, in many other cases, a variance caused by using the term "rail*road*" instead of "rail*way*" in stating the corporate name in a pleading or writ has been held immaterial or curable by amendment.[3]

§ 4. **What are railroads.**—A railroad has been defined as "a road graded and having rails of iron or other material for the wheels of carriages to run upon."[4] This definition is no longer accurate as it was when the patrons of the railroad company furnished the vehicles.[5] It is impossible to formulate a

[1] Gyger *v.* Philadelphia, etc., R. Co., 136 Pa. St. 96, 46 Am. & Eng. R. Cas. 229, n; Hestonville, etc., R. Co. *v.* City of Philadelphia, 89 Pa. St. 210; Borough of Millvale *v.* Evergreen R. Co., 131 Pa. St. 1, 46 Am. & Eng. R. Cas. 219; State *v.* Brin, 30 Minn. 522; Mobile, etc., R. Co. *v.* Yeates, 67. Ala. 164; Georgia, etc., R. Co. *v.* Propst, 83 Ala. 518. *Contra:* Munkers *v.* Kansas City, etc., R. Co., 60 Mo. 334, in which it is held that a "railroad" is the graded right of way and the "railway" consists of the rails and ties laid thereon.

[2] State *v.* Brin, 30 Minn. 522. In this case the variance was in an indictment.

[3] Where a petition is filed against the "C. Rail*road* Co." and the summons or citation is issued against the "C. Rail*way* Co.," the variance is immaterial. Galveston, etc., R. Co. *v.* Donahoe, 56 Tex. 162; Central, etc., R. Co. *v.* Morris, *et al.*, 68 Tex. 49, 28 Am. & Eng. R. Cas. 50. See, also, Alabama & V. R. R. Co. *v.* Bolding, 69 Miss. 255, s. c. 13 So. R. 844. The use of the word "railroad" instead of "railway" in a writ may be cured by amendment after default. Chicago, etc., R. Co. *v.* Johnson, 89 Ind. 88, 13 Am. & Eng. R. Cas. 181. A declaration may be similarly amended after the trial. East Tenn., etc., R. Co. *v.* Mahoney, 89 Tenn. 311, 15 S. W. R. 652.

[4] Pierce on Railroads, p. 2; Trunick *v.* Smith, 63 Pa. St. 18; Com. *v.* Fitchburg R. Co., 12 Gray (Mass.) 180.

[5] For other definitions see Seymour *v.* Canandaigua, etc., R. Co., 25 Barb. (N. Y.) 284; Sharpless *v.* Mayor, etc.,

definition giving the term "railroad" an inflexible meaning. The truth is, it has no one settled and invariable meaning, and what it includes in any particular case depends on the connection in which it is used.[1] In one case it is held to mean the road-bed, tracks, and necessary appurtenances.[2] Again, it is said to include the main line over which cars are run, together with all switches, sidings, and branch roads;[3] but not to include depot buildings, offices and warehouses.[4] Where the reference is to a permanent structure designated as a public highway, the word includes the graded and railed way ready for the train of locomotive and cars, which, together with other personal property, are not included.[5] While railroads are often called highways, they are not included in the phrase "public roads, streets and highways," in a statute designating the places where telegraph companies are authorized to erect their lines.[6] In a statute providing for the assessment of the "entire railway," it is defined as including "all property, real and personal, exclusively used in the operation of such railway."[7] A line for the private use of the controlling stockholder in conveying materials to his mill, though built by a company organized under the general law providing for the formation

21 Pa. St. 147, 59 Am. Dec. 759; Tracy *v.* Troy, etc., R. Co., 38 N. Y. 433; Lake Shore, etc., R. Co. *v.* Kaste, 11 Ill. App. 536; Hall *v.* Brown, 54 N. H. 495; 1 Redfield on Railways, 6th Ed., 1; 19 Am. & Eng. Ency. of Law, 777. For a discussion of the history of railways see 10 Ency. Americana, 478.

[1] Neither the kind of motive power used nor its location necessarily determines the character of the road. Central, etc., R. Co., *v.* Twenty-third St. R. Co., 54 How. Pr. (N. Y.) 168. See, also, Newell *v.* Minneapolis, etc., R. R. Co., 35 Minn. 112, s. c. 59 Am. R. 303; Carli *v.* Stillwater, etc., Ry. Co., 28 Minn. 373, s. c. 41 Am. R. 290; Booth on Street Railways, § 1.

[2] State *v.* Hudson Terminal R. Co., 46 N. J. L. 289.

[3] Black *v.* Philadelphia, etc., R. Co., 58 Pa. St. 249; St. John *v.* Erie R. Co., 22 Wall. (U. S.) 136; Cleveland, etc., R. Co. *v.* Speer, 56 Pa. St. 325; Lake Superior, etc., R. Co. *v.* U. S., 12 Ct. of Claims 35, 93 U. S. 442. But see Richter *v.* Penn Co., 104 Pa. St. 511; Terre Haute R. Co. *v.* Peoria Co., 61 Ill. App. 405.

[4] South Wales R. Co. *v.* Local Board of Health, 4 E. & B. 189, 82 E. C. L. 188.

[5] Lake Superior, etc., R. Co. *v.* U. S., 12 Ct. of Claims 35, 93 U. S. 442.

[6] New York City, etc., R. R. Co. *v.* Central Union Tel. Co., 21 Hun (N. Y.) 261, s. c. 1 Am. Electrical Cases 315.

[7] R. S. Arizona, 1887, § 2649. Atlantic, etc., R. Co. *v.* Yavapai County, (Ariz.) 21 Pac. R. 768.

and regulation of public railroad companies, has been held not to be such a railroad as may exercise the right of eminent domain;[1] for one of the essential characteristics of a railroad authorized to exercise that right is said to be its readiness to render, without discrimination, the services which all citizens alike, may claim.[2] But, as will hereafter be seen, roads and side tracks to mills, manufacturing establishments and the like may constitute a public as well as a private use for which the exercise of the power of eminent domain may be invoked.[3] The word "railroad" is sometimes applied to the corporation owning the road and running trains thereon for the carriage of freight and passengers.[4] Ordinarily, however, the corporation is designated as a "railroad company"[5] or "railroad corporation;"[6] and the fact that it is authorized to do other kinds of business besides that of transporting freight and passengers is held not to render these terms inapplicable;[7] nor does their applicability necessarily depend on the possession of rolling stock or on the control of the road's operation, for a railroad company or corporation can exist without either.[8]

§ 5. **"Railroad track"—"Right of way"—"Road-bed" and "roadway."**—The term "railroad track" is used to designate the right of way with its grades and superstructure of

[1] Weidenfeld *v.* Sugar Run R. Co., 48 Fed. Rep. 615. See, also, *Re* Split Rock Cable Co., 128 N. Y. 408; Pittsburg, W. & K. R. R. Co. *v.* Benwood Iron Works, 31 W. Va. 710. But see *Ex parte* Bacot, 36 S. Car. 125, s. c. 50 Am. & Eng. R. Cas. 597.

[2] Colorado, etc., R. Co. *v.* Union, etc., R. Co., 44 Am. & Eng. R. Cas. 10 and note on page 25.

[3] Harvey *v.* Thomas, 10 Watts (Pa.) 63; Philadelphia, etc., R. R. Co. *v.* Williams, 54 Pa. St. 103; Getz's Appeal, 65 Pa. St. 1, 3 Am. & Eng. R. R. Cas. 186; Kettle River R. R. *v.* Eastern R. R., 41 Minn. 461; South Chicago R. R. *v.* Dix, 109 Ill. 237.

[4] Calhoun *v.* Paducah, etc., R. Co., 2 Flip. (U. S.) 442, 9 Cent. L. Jour. 66.

[5] Griggs *v.* Houston, 104 U. S. 553; Great Western R. Co. *v.* Central Wales R. Co., 52 L. J. Q. B. 211, L. R. 10 Q. B. Div. 231.

[6] Union Trust Co. *v.* Kendall, 20 Kan. 515.

[7] Randolph Co. *v.* Post, 93 U. S. 502; Kentucky Imp. Co. *v.* Slack, 100 U. S. 648. The right to construct a railroad and to erect a ferry may be granted to one corporation, but "a ferry is not a railroad, nor a railroad a ferry." Aikin *v.* Western R. R. Co., 20 N. Y. 370, 376.

[8] Pennsylvania R. Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290, 24 Am. & Eng. R. Cas. 58, which was a suit maintained by such a company.

iron rails.[1] It may include depot buildings, round-houses, machine shops, coal or wood sheds and water-tanks, if they are on the right of way.[2] The latter term has been defined as meaning the way over which the company has the right to pass in the operation of its trains;[3] and as including all of the strip of land appropriated by the company for its use and upon which its road-bed has been built.[4] The road-bed is the foundation upon which the superstructure rests, while the term "roadway" is said to include all the ground upon which the company is authorized to construct and lay its bed and track.[5]

§ 6. **Street Railways.**—A street railway has been defined as "a railway laid down upon roads or streets for the purpose of carrying passengers."[6] The distinctive feature or characteristic of such a railway, considered in relation to ordinary commercial railroads, is that it is intended and used for the transportation of passengers and not of freight.[7] This, and

[1] Delaware & H. C. Co. *v.* Village of Whitehall, 90 N. Y. 21, 10 Am. & Eng. R. Cas. 227.

[2] Pfaff, Auditor, *et al. v.* Terre Haute, etc., R. Co., 108 Ind. 144, construing § 6410 R. S. Ind. 1881. See Acts 1891, Ind. 119, § 78.

[3] Pfaff, Auditor, *et al. v.* Terre Haute, etc., R. Co., 108 Ind. 144; Williams *v.* Western, etc., R. Co., 50 Wis. 71, s. c. 5 Am. & Eng. R. R. Cas. 290. As will hereafter be shown, however, it is usually an easement or incorporeal hereditament rather than an estate in fee. See Cincinnati, etc., Ry. Co. *v.* Geisel, 119 Ind. 77, 78 and authorities cited; 42 Cent. L. J. 156.

[4] Keener *v.* Union Pacific R. Co., 31 Fed. R. 126. In the statute, Gen. Stat. Colo., § 2847, which this case construes, the "entire railway" is defined as including the right of way.

[5] San Francisco *v.* Central Pac. R.R. Co., 63 Cal. 467; San Francisco, etc., R. R. Co. *v.* State Board, 60 Cal. 12, 34; Appeal of North Beach, etc., Co., 32 Cal. 499. Fences, however, are not part of the roadway to be assessed as such for purposes of taxation, but are to be assessed as improvements under the California statute. Santa Clara County *v.* Southern Pac. R. R. Co., 118 U. S. 394, s. c. 6 Sup. Ct. R. 1132, 1142.

[6] Elliott on Roads and Streets, 557, quoted in Montgomery *v.* Santa Ana, etc., R. R. Co., 104 Cal. 186, s. c. 25 L. R. A. 654; Louisville, etc., R. R. Co. *v.* Louisville City Ry. Co., 2 Duv. (Ky.) 175.

[7] Elliott on Roads and Streets, 557; Booth on Street Railways, § 1; Carli *v.* Stillwater St. Ry. Co., 28 Minn. 373, s. c. 41 Am. R. 290, s. c. 3 Am. & Eng. R. R. Cas. 226. See, also, Wiggins Ferry Co. *v.* East St. Louis Union Ry. Co., 107 Ill. 450; Atty. General *v.* Chicago, etc., R. R. Co., 112 Ill. 611; Potts *v.* Quaker City, etc., R. R. Co. 12 Pa. Co. Ct. R. 593, s. c. 31 W. N. Cas. 290; Funk *v.* St. Paul, etc., R. Co., (Minn.) 63 N. W. R. 1099, 1101.

the character of the use of the street, rather than the motive power, distinguish it from the ordinary commercial railroad;[1] and such a railway, laid in a street for the purpose of carrying passengers and facilitating its use by the public, is a street railway, no matter what motive power may be used to propel the cars.[2] But street railways are not always included when the term "railroads" is used in a statute. The exact meaning of that term, as already stated, depends upon the connection in which it is used. Thus, it has been held to include street railroads operated by horse power, in statutes giving certain powers to "railroads;"[3] making the proprietors of any "railroad" liable for injuries caused by the negligence of its servants;[4] and prohibiting the obstruction of "railroad tracks."[5] So, a statute authorizing the consolidation of "railroads" has been held to include street railways,[6] and an act taxing the property of "any railroad company" has been held to include the property of a street railway.[7] But a statute prohibiting the location within a certain territory of railroads other than that of a designated company, is held not to authorize an injunction restraining a street railway company from building its road across

[1] Williams *v.* City Electric St. Ry. Co., 41 Fed. R. 556, s. c. 43 Am. & Eng. R. R. Cas. 215; Newell *v.* Minneapolis, etc., R. Co., 35 Minn. 112, s. c. 59 Am. R. 303. See, also, annotation in 2 Am. Law Reg. & Rev., N. S. (Jan., 1895) 43.

[2] Nichols *v.* Ann Arbor, etc., St. Ry. Co., 87 Mich. 361; Briggs *v.* Lewiston, etc., R. R. Co., 79 Me. 363, 367, s. c. 32 Am. & Eng. R. R. Cas. 167; Clement *v.* City of Cincinnati, 16 Weekly Law Bul. 355. But see East End St. R. R. Co. *v.* Doyle, 88 Tenn. 747, s. c. 9 L. R. A. 100; Stanley *v.* City of Davenport, 54 Iowa 463, s. c. 37 Am. R. 216. And an underground railway may be a street railway. *In re* New York District Ry. Co., 107 N. Y. 42, s. c. 14 N. E. R. 187, s. c. 32 Am. & Eng. R. R. Cas. 202.

[3] Chicago *v.* Evans, 24 Ill. 52. Statutes authorizing the incorporation of railroad companies are usually comprehensive enough to authorize the incorporation of street railway companies.

[4] Johnson *v.* Louisville City. R. Co., 10 Bush (Ky.) 231. But see Lax *v.* Forty-second St., etc., Ry. Co., 46 N. Y. Super. Ct. 448; Funk *v.* St. Paul, etc., R. Co., (Minn.) 63 N.W. R. 1099.

[5] Price *v.* State, 74 Ga. 378.

[6] Hestonville, etc., R. R. Co. *v.* Philadelphia, 89 Pa. St. 210; *In re* Washington St. Ry. Co., 115 N. Y. 442, s. c. 40 Am. & Eng. R. R. Cas. 588. But see Gyger *v.* Philadelphia, etc., R. R. Co., 136 Pa. St. 96; Shipley *v.* Continental, etc., R. R. Co., 13 Phil. (Pa.) 128.

[7] Citizens' Passenger R. R. Co. *v.* Pittsburg, 104 Pa. St. 522, s. c. 17 Am. & Eng. R. R. Cas. 438. See *ante*, § 1, note 1.

such territory.[1] A penalty denounced against railroad companies demanding fares in excess of the lawful rate has been held not to apply to street railroads;[2] nor, according to one decision, does a statute authorizing a laborer's lien on a railroad apply to a street cable railroad.[3] A "dummy line," operated over the county roads between two cities along whose streets its track extends to termini in their centers, is a "railroad" within the meaning of a statute requiring all trains to stop within one hundred feet of where two railroads cross each other; the court holding, however, that it is "not a street railway" because not located within and dependent on any municipality.[4] Such a line, engaged in the streets of a city exclusively in carrying passengers is also held to be a "railroad" within a statute requiring some person on the locomotive to keep a lookout, and requiring the whistle to be sounded to prevent accidents;[5] but not a "railroad" within a statute prohibiting the occupation of streets at crossings.[6] As street railways are usually constructed on streets and do not, ordinarily, constitute an additional burden, there is seldom any necessity for the exercise of power of eminent domain in order to obtain a right of way; but, like commercial railroads, they are of a *quasi* public nature and may be authorized to condemn property for a right of way as for a public use.[7] But it has been held that a statute authorizing the condemnation of a right of way by corporations "organized for the construction of any railway" did not apply to street railways.[8] Such

[1] Louisville, etc., R. Co. *v.* Louisville, etc., R. Co., 2 Duv. (Ky.) 175.

[2] Moneypenny *v.* Sixth Avenue R. Co., 4 Abb. Pr. N. S. (N. Y.) 357.

[3] Front St. Cable R. Co. *v.* Johnson, 2 Wash. 112, 25 Pac. R. 1084. *Contra:* St. Louis Bolt and Iron Co. *v.* Donohoe, 3 Mo. App. 559. In the former case, however, the statutory lien extended to the land and, as the street railway company did not own the fee, this was the principal reason for holding the statute inapplicable.

[4] Birmingham M. R. Co. *v.* Jacobs, 92 Ala. 187, 49 Am. & Eng. R. Cas. 263, 9 So. R. 320.

[5] Katzenberger *v.* Lawo, 90 Tenn. 238, 16 S. W. R. 611, construing Tenn. code, § 1298.

[6] Howard *v.* Union F. R. Co., 156 Mass. 159, 30 N. E. R. 479. See, also, Byrne *v.* Kansas City, etc., R. R. Co., 61 Fed. R. 605, s. c. 24 L. R. A. 693.

[7] *In re* Petition of Kerr, 42 Barb. (N. Y.) 119; Union Depot R. R. Co. *v.* Southern R. R. Co., 105 Mo. 562; St. Louis R. R. Co. *v.* Southern R. R. Co., 105 Mo. 577, s. c. 46 Am. & Eng. R. R. Cas. 1; Moran *v.* Ross, 79 Cal. 159, s. c. 21 Pac. R. 547, s. c. 39 Am. & Eng. R. R. Cas. 1.

[8] Thompson-Houston Electric Co. *v.*

companies are common carriers of passengers,[1] and, while not usually common carriers of freight, may become liable as common carriers of goods by assuming to act as such.[2]

§ 7. **Elevated railroads.** — Elevated railroads are so far "railroads" that they may be organized under general statutes authorizing the incorporation of railroad companies.[3] But it has been held that a company incorporated and organized as a street railway company has no authority or right to build and operate an elevated railroad.[4] Such roads are generally intended and used merely for the carriage of passengers along the streets, and, where such is the case, it seems to us that, upon principle, they should be regarded as street railways rather than as ordinary commercial railroads.[5] But whether a street railway company has authority to construct an elevated road or not must depend largely upon the particular charter or law under which it is organized, and the construction and use of the road may be such as to constitute an additional burden

Simon, 20 Ore. 60, s. c. 25 Pac. R. 147, s. c. 47 Am. & Eng. R. R. Cas. 57. While such statutes should be strictly construed, yet the soundness of the decision in the case just cited seems to us to admit of some doubt. See Ogden City Ry. Co. *v.* Ogden City, 7 Utah 207, s. c. 26 Pac. R. 288.

[1] Thompson-Houston Electric Co. *v.* Simon, 20 Ore. 60, s. c. 25 Pac. R. 147.

[2] Levi *v.* Lynn, etc., R. R. Co., 11 Allen (Mass.) 300, s. c. 87 Am. Dec. 713.

[3] Lieberman *v.* Chicago, etc., R. Co., 141 Ill. 140, 51 Am. & Eng. R. Cas. 581, 30 N. E. R. 544. See, also, Fulton *v.* Short Route R. Co., 85 Ky. 640, 7 Am. St. R. 619, 32 Am. & Eng. R. Cas. 256, 4 S. W. R. 332, where it is held that a street railroad may elevate its track if the character of the country requires it. Compare Potts *v.* Quaker City El. R. Co., 161 Pa. St. 396, s. c. 29 Atl. R. 108. And in Potts *v.* Quaker City El. R. Co., 12 Pa. Co. Ct. Rep. 593, it was held that an elevated railroad through the streets of a city for the carriage of passengers exclusively can not be organized under the general railroad law of Pennsylvania. See, also, Schaper *v.* Brooklyn, etc., R. R. Co., 124 N. Y. 630; *In re* People's Rapid Transit Co. *v.* Dash, 125 N. Y. 93, s. c. 46 Am. & Eng. R. R. Cas. 114.

[4] Commonwealth *v.* Northeastern El. Ry. Co., 161 Pa. St. 409, s. c. 29 Atl. R. 112.

[5] See Commonwealth *v.* Northeastern El. Ry. Co., (Pa. Com. Pl.) 3 Pa. Dist. R. 104; Potts *v.* Quaker City El. Ry. Co., (Pa. Com. Pl.) 12 Pa. Co. Ct. R. 593, 2 Pa. Dist. R. 200. "There is no doubt that a railway under, or elevated above, the surface of a street, is still a street railway in that street." Per Peckham, J., *In re* People's Rapid Transit Co. *v.* Dash, 125 N. Y. 93, s. c. 10 L. R. A. 728, 729.

and entitle the abutting owners to damages, where they would not be entitled to compensation if it were an ordinary surface street railroad.[1] Thus, it has been held that an elevated railroad supported by posts, with an overhead road-bed enclosed at the sides, is a "railway" and not a "street railway" within the meaning of a statute allowing the municipal authorities to authorize the construction of either in a street, but requiring compensation to the abutters where a "railway" is placed in the street.[2]

§ 8. **Electric railroads.**—Railroads operated by electricity and engaged in carrying passengers along the streets of a city are classed with street railways rather than with ordinary commercial railroads.[3] Their use being in furtherance of travel upon the streets may be said to be within the original purposes for which the streets were dedicated and laid out, and they do not, therefore, when properly constructed, constitute a new servitude or additional burden for which abutting property-owners are entitled to compensation.[4] In this respect, as in most

[1] Story *v.* New York El. R. R. Co., 90 N. Y. 122; American Bank Note Co. *v.* N. Y. El. R. R. Co., 129 N. Y. 252; Egerer *v.* N. Y. Cent., etc., R. R. Co., 130 N.Y. 108, 14 L. R. A. 381, and note; Abendroth *v.* Manhattan Ry. Co., 122 N. Y. 1, s. c. 19 Am. St. R. 461; N. Y. El. R. R. Co. *v.* Fifth Nat. Bank, 135 U. S. 432, 440, s. c. 10 Sup. Ct. R. 743; Lahr *v.* Metropolitan El. R. R. Co., 104 N. Y. 268; Kane *v.* N. Y. El. R. R. Co., 125 N. Y. 164, s. c. 46 Am. & Eng. R. R. Cas. 137. Compare Fulton *v.* Short Route, etc., Co., 85 Ky. 640; Garrett *v.* Lake Roland El. R. R. Co., (Md.) 24 L. R. A. 396.

[2] Freiday *v.* Sioux City, etc., Co., (Iowa) 26 L. R. A. 246. See, also, *In re* People's Rapid Transit Co. *v.* Dash, 125 N. Y. 93, s. c. 10 L. R. A. 728.

[3] See Thompson - Houston Electric Co. *v.* Simon, 20 Ore. 60, s. c. 25 Pac. Rep. 147, s. c. 47 Am. & Eng. R. R. Cas. 51; Hudson River Tel. Co. *v.* Watervliet, etc., Co., 135 N. Y. 393, s. c. 32 N. E. R. 148; Paterson Ry. Co. *v.* Grundy, 51 N. J. Eq. 213, s. c. 26 Atl. Rep. 788; Halsey *v.* Rapid Transit Ry. Co., 47 N. J. Eq. 380, s. c. 20 Atl. Rep. 859.

[4] Dubois Traction Co. *v.* Buffalo, C. & P. Ry. Co., 149 Pa. St. 1, s. c. 24 Atl. Rep. 179, 11 Ry. & Corp. L. Jour. 6; Lockhart *v.* Craig St. Ry. Co., 139 Pa. St. 419, s. c. 21 Atl. Rep. 26; Taggart *v.* Newport St. Ry. Co., 16 R. I. 668, s. c. 19 Atl. Rep. 326; West Jersey R. R. Co. *v.* Camden, etc., Ry. Co., (N. J.) 29 Atl. R. 423; Paterson Ry. Co. *v.* Grundy, (N. J.) 26 Atl. Rep. 788; Detroit St. Ry. Co. *v.* Mills, 85 Mich. 634, s. c. 48 N. W. R. 1007; Koch *v.* North Avenue Ry. Co., 75 Md. 22, s. c. 23 Atl. Rep. 463; Green *v.* City Suburban Ry. Co., (Md.) 28 Atl. Rep. 626; Chicago & C.T. Ry. Co. *v.* Whiting, etc.,

respects, they are governed by the same rules that apply to ordinary street railways operated by animal power, and not by the rules applicable to commercial railroads. But the more dangerous nature of the motive power may require, both as to passengers and to other travelers, or the public generally, a degree of care not required in the case of horse railways, that is to say, the care should be in proportion to the danger. A forcible illustration of the rule that electric railways for carrying passengers along the streets are to be regarded as street railways rather than as commercial railroads is found in a recent case[1] in which it is held that an electric railway company has the right to run its cars across a public toll bridge, upon the payment of adequate toll, where the statute gives it the right to use "any street or highway." The court regarded it as a use which was consistent with the purpose for which the bridge was erected, being in furtherance of public travel and accommodation, and held that it did not constitute a taking of property under the power of eminent domain.[2]

§ 9. **Cable railroads.**—Railroads operated by the cable system are also classed with street railways. They do not, therefore, constitute an additional burden any more than ordinary horse railways.[3] In one case however, it was held that a cable road is, "as to one part of the street, surface, and as to another part, subterranean," and that a company organized merely as a surface railway company had no right to excavate the streets and construct a subterranean cable system;[4] but the

Co., (Ind.) 38 N. E. R. 604; Cincinnati Inclined Plane Ry. Co. *v.* City, etc., Co., 48 Ohio St. 390, s. c. 27 N. E. Rep. 890, 10 Ry. & Corp. Law Jour. 82; Williams *v.* City Electric St. Ry. Co., 41 Fed. R. 556; Cumberland T. &. T. Co. *v.* United Electric Ry. Co., 93 Tenn. 492, s. c. 29 S. W. R. 104; Limburger *v.* San Antonio, etc., St. Ry. Co., (Tex.) 30 S. W. R. 533.

[1] Pittsburgh & W. E. Passenger R. R. Co. *v.* Point Bridge Co., 165 Pa. St. 37, s. c. 26 L. R. A. 323.

[2] See, also, Covington & C. Bridge Co. *v.* South Covington, etc., Co., 93 Ky. 136, s. c. 15 L. R. A. 828.

[3] Rafferty *v.* Central Traction Co., 147 Pa. St. 579, s. c. 23 Atl. R. 884; Lorie *v.* North Chicago Ry. Co., 32 Fed. R. 270; Harrison *v.* Mt. Auburn Cable Ry. Co., (Ohio) 17 W. L. Bull. 265; Clement *v.* Cincinnati, (Ohio) 116 W. L. Bull. 355; Booth on Street Railways, § 84. Compare Tuebner *v.* California St. Ry. Co., 66 Cal. 171.

[4] People, *ex rel.* Third Avenue R. R. Co., *v.* Newton, 112 N. Y. 396, s. c. 19 N. E. R. 831.

same court, in a later case, held that such a company could be authorized by the legislature to use the cable system without the consent of the local authorities, notwithstanding a provision of the constitution prohibiting the passage of any law authorizing the construction or operation of a street railroad without first obtaining the consent of the local authorities.[1] Although cable roads in city streets engaged only in carrying passengers, are usually regarded as street railways, yet a company which carries freight as well as passengers, whose road is but three miles in length, over two miles of which cars are drawn by locomotives, is a "railroad company," taxable as an ordinary railway, notwithstanding the fact that one mile of the line, up a steep ascent, is operated by cable.[2]

[1] Matter of Petition of Third Avenue R. R. Co., 121 N. Y. 536. The court said that, as the railroad had already been organized, constructed and operated as a horse street railway, the act of the legislature in question did not attempt to grant a franchise or authorize the "construction or operation of a street railroad," but merely regulated the use of an existing franchise.

[2] State, Duluth Belt Line R. R. Co. *v.* Eleventh Judicial District Ct., 54 Minn. 341, s. c. 55 N. W. R. 816.

CHAPTER II.

PROMOTION AND FORMATION OF THE CORPORATION.

§ 10. Promoters—Who are.
11. Fiduciary relation of promoters —Duties and liabilities.
12. Promoter may sell property to the corporation.
13. Personal liability of promoters —When partners.
14. Contracts of promoters—When binding on corporation.
§ 15. Legislative authority essential to creation of corporation.
16. Creation by special charter.
17. Acceptance of charter.
18. Incorporation under general laws.
19. Perfecting the organization.
20. Defective organization—Waiver —Collateral attack.

§ 10. **Promoters—Who are.**—The steps preliminary to the organization of a railroad corporation are generally taken by persons known as "promoters," who bring together the persons interested in the enterprise, aid in procuring subscriptions, and make the necessary arrangements looking toward the purchase of property or the entering into contracts by the new company.[1] By merely subscribing the articles, or taking stock in a company not yet incorporated, a person does not assume the character of a promoter.[2] But circumstances which show that one is assuming to act in the interest of a project, and is seeking to influence others to give it pecuniary assistance, will afford evidence that he has undertaken the responsibility of a promoter toward persons who deal with him as such.[3]

[1] Cook on Stock and Stockholders, § 651; Beach on Law of Railways, § 1; Twycross *v.* Grant, L. R. 2 C. P. Div. 469, 503; Yale Gas Stove Co. *v.* Wilcox, quoted in note to § 11, *infra*.

[2] St. Louis, etc., R. Co. *v.* Tiernan, 37 Kan. 606, 40 Am. & Eng. R. Cas. 525; Ward *v.* Brigham, 127 Mass. 24. See, also, Taylor on Private Corporations, § 73. But see Lake *v.* Argyle, 6 Q. B. 477.

[3] Sidney, etc., Co. *v.* Bird, L. R. 31 Ch. Div. 328; Lake *v.* Argyle, 6 Q. B. 477; Woodbury, etc., Co. *v.* Loudenslager, (N. J.) 35 Atl. R. 436.

§ 11. **Fiduciary relation of promoters—Duties and liabilities.**—A promoter occupies a fiduciary relation toward the company, and is subject, in general, to the disabilities attached to trustees.[1] He is forbidden to make any secret profits at the

[1] Emma Silver M. Co. *v.* Grant, L. R. 11 Ch. Div. 918; Taylor on Private Corporations, § 82. In the case of Yale Gas Stove Co. *v.* Wilcox, 64 Conn. 101, 25 L. R. A. 90, the court said: "Who and what are 'promoters' so-called, of corporations, and what their relations to the corporations which they help to form, has been more frequently judicially considered and determined by the English courts than by those of this country. * * * A 'promoter' has been defined to be a person who organizes a corporation. It is said to be, not a legal, but a business term, 'usefully summing up in a single word, a number of business operations familiar to the commercial world, by which a company is generally brought into existence.' Bowen, J., in Printing Co. *v.* Green, 28 Weekly Rep. (Q. B. Div., 1880) 351, 352. That such persons occupy a fiduciary relation toward the company or corporation whose organization they seek to promote is well settled by the decisions of both countries. Lord Cotton prefers to call them 'trustees.' Bagnall *v.* Carlton, 6 Ch. Div. 371, 385. Sir George Jessel, M. R., in Phosphate Co. *v.* Erlanger, L. R. 5 Ch. Div. 73, said: 'Promoters stand in a fiduciary relation to that company which is their creature.' In Erlanger *v.* Phosphate Co., 3 App. Cas. 1218, the Lord Chancellor said of promoters: 'They stand, in my opinion, undoubtedly in a fiduciary position. They have in their hands the creation and molding of the company. They have the power of defining how, and when, and in what shape, and under what supervision, it shall start into existence and begin to act as a trading corporation. If they are doing all this in order that the company may, as soon as it starts into life, become, through its managing directors, the purchasers of the property of themselves (the promoters) it is, in my opinion, incumbent upon the promoters to take care that in forming the company they provide it with an executive; that is to say, with a board of directors, who shall both be aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made. I do not say that the owner of property may not promote and form a joint stock company and then sell his property to it; but I do say that if he does he is bound to take care that he sell it to the company through the medium of a board of directors who can and do exercise an independent and intelligent judgment on the transaction, and who are not left under the belief that the property belongs, not to the promoter, but to some other person.' Lord O'Hagan, referring to the same subject, expressed a similar opinion in even more emphatic language, declaring that while an original purchase might be legitimate, and not less so because the object of the purchaser was to sell it again, and to sell it by forming a company which might afford them a profit on the transaction, yet 'the privilege given them for promoting such a company for such an object in-

expense of the company,[1] or to gain any advantage over other stockholders arising from the profits of the company's transactions.[2] He must turn over to the company any commissions received for the sale of property to the company,[3] and it has

volved obligations of a very serious kind. It required, in its exercise, the utmost good faith, the completest truthfulness, and a careful regard to the protection of the future stockholders.' The test, therefore, of the validity of such transactions is that it must, in all its parts, be open and fair, so that the promoters shall not, in fact, substantially, 'act both as vendors and vendees, and in the latter capacity approve a transaction suggested by them in the former.' Foss *v.* Harbottle, 2 Hare 461, 488; McElhenny's Appeal, 61 Pa. St. 188; Simons *v.* Mining Co., 61 Pa. St. 202; Oil Co. *v.* Densmore, 64 Pa. St. 43; Mining Co. *v.* Spooner, 74 Wis. 307; Land Co. *v.* Case, 104 Mo. 572; *In re* British Seamless Paper-box Co., 17 Ch. Div. 467; Sewage Co. *v.* Hartmont, 5 Ch. Div. 394. In Hichens *v.* Congreve, 1 Russ. & M. 150 (on appeal, 4 Russ. 562), three promoters induced their company to buy a mine for £25,000, of which they received from the vendor and divided among themselves, £15,000. This they were compelled to account for to the company. Similar cases are Beck *v.* Kantorowicz, 3 Kay & J. 230; Printing Co. *v.* Green, *supra;* Mining Co. *v.* Grant, 11 Ch. Div. 918; Bagnall *v.* Carlton, *supra;* Kent *v.* Brickmaking Co., 17 Law T. (N. S.) 77; Water Co. *v.* Flash, 97 Cal. 610, 32 Pac. R. 600. * * * A careful examination of the cases will, we think, disclose two grounds of liability of the defendants to corporations for undisclosed profits resulting from transactions with such corporations: First, where the defendants are corporate fiduciaries. The characteristic of this relation is trust. Such a relation undoubtedly exists between companies and their officers, such as directors. Mallory *v.* Mallory-Wheeler Co., 61 Conn. 135, 23 Atl. R. 707. With reference to promoters, since a man can not receive an appointment from a non-existent company, the proof may be less obvious; but it may, nevertheless, be shown conclusively by a variety of representations, admissions, and acts. The second ground of liability is fraud. The law does not prohibit a promoter from dealing with his company, but he must make full disclosure to the company of his relations to the property that is the subject of his deal. Suppression, concealment, or misrepresentation of material facts is fraud, upon proof of which rescission of contract, or repayment of the secret profits, will be compelled."

[1] Emma Silver M. Co. *v.* Grant, L. R. 11 Ch. Div. 918; Pittsburg Mining Co. *v.* Spooner, 74 Wis. 307, s. c. 17 Am. St. R. 149 and note; Lydney, etc., Co. *v.* Bird, L. R. 33 Ch. Div. 85, s. c. 55 L. T. N. S. 558; Emery *v.* Parrott, 107 Mass. 95; Simons *v.* Vulcan Oil, etc., Co., 61 Pa. St. 202, s. c. 100 Am. Dec. 628.

[2] Getty *v.* Devlin, 54 N. Y. 403; Chandler *v.* Bacon, 30 Fed. R. 538, 540; Densmore Oil Co. *v.* Densmore, 64 Pa. St. 43; Bagnall *v.* Carlton, L. R. 6 Ch. Div. 371; Emery *v.* Parrott, 107 Mass. 95.

[3] Emma Silver M. *v.* Grant, L. R. 11

been held that the company may sue the seller to recover such a commission if it is not yet paid,[1] or it may, in a proper case, upon discovery of the unfair character of the transaction, rescind the contract of sale and sue the promoters to recover the moneys paid them for the property.[2]

§ 12. **Promoter may sell property to the corporation.**—A promoter may, however, honestly and fairly sell to the company property which he owned before instituting the scheme for incorporation.[3] This is true even when the scheme relates to the development of the very property which he sells to the corporation.[4] But it seems that the corporation may rescind such a contract, if the sale be made for an exorbitant price and without disclosing the real ownership of the property.[5] And after the formation of the company is begun a promoter can not purchase property and sell it to the corporation at an advanced price without a full disclosure of the facts.[6]

Ch. Div. 918; Lydney, etc., Co. *v.* Bird, L. R. 33 Ch. Div. 85, 55 L. T. N. S. 558; Beck *v.* Kantorowicz, 3 Kay & J. 230.

[1] Whaley, etc., Co. *v.* Green, L. R. 5 Q. B. Div. 109, 41 L. T. N. S. 674.

[2] St. Louis, etc., Mining Co. *v.* Jackson *et al.*, 5 Cent. L. J. 317; Phosphate Sewage Co. *v.* Hartmont, L. R. 5 Ch. Div. 394, s. c. 37 L. T. N. S. 9. "The corporation is the proper plaintiff in a suit to set aside the promoter's acts." Taylor on Private Corporations, § 83, citing Ex-Mission Land Co. *v.* Flash, 97 Cal. 610. So, in a suit to recover the avails of a secret agreement between him and one from whom the corporation purchases property. Yale Gas Stove Co. *v.* Wilcox. (Conn.) 25 L. R. A. 90. See, also, 3 Pom. Eq. Jur., §§ 1094, 1096.

[3] Taylor on Priv. Corp., § 83; Burbank *v.* Dennis, 101 Cal. 90, s. c. 35 Pac. R. 444; Plaquemines, etc., Co. *v.* Buck, (N. J.) 27 Atl. R. 1094. See, also, note to Yale Gas Stove Co. *v.* Wilcox, 25 L. R. A. 90, and note to Pittsburg Min. Co. *v.* Spooner, 74 Wis. 307, s. c. 17 Am. St. R. 149.

[4] Dorris *v.* French, 4 Hun (N.Y.) 292; Gover's Case, L. R. 1 Ch. Div. 182; Seymour *v.* Spring Forest, etc., Ass'n, 144 N. Y. 333, s. c. 26 L. R. A, 859; Densmore Oil Co. *v.* Densmore, 64 Pa. St. 43.

[5] *In re* Cape Breton Co., L. R. 26 Ch. Div. 221, L. R. 29 Ch. Div. 795; Lindsay Petroleum, etc., Co. *v.* Hurd, L. R. 5 P. C. 221; Taylor on Private Corporations, § 83. But see Densmore Oil Co. *v.* Densmore, 64 Pa. St. 43.

[6] South Joplin Land Co. *v.* Case, 104 Mo. 572; Paducah Land, etc. Co. *v.* Mulholland, 15 Ky. Law R. 22; Ex-Mission Land, etc., Co. *v.* Flash, 97 Cal. 610; Plaquemines, etc., Co. *v.* Buck, (N. J.) 27 Atl. R. 1094; Pittsburg Min. Co. *v.* Spooner, 74 Wis. 307, s. c. 17 Am. St. R. 149. Where a promoter fraudulently represents that he has bought property for a proposed corporation at a certain price, and the

§ 13. **Personal liability of promoters—When partners.**—The promoters, as a general rule, are personally liable on all contracts entered into by them before the organization is completed,[1] except where they have expressly stipulated against personal liability, or except, perhaps, where the contract is made in the name of the proposed corporation alone and the credit is knowingly given to it and not to the promoters.[2] A promoter can not, ordinarily, in the absence of evidence that he has received authority to act for his associates, render them responsible for his acts,[3] for the several promoters are not partners.[4] They may, however, take on the character of partners by holding themselves out as such,[5] or by fraudulently acting in concert for their own common personal benefit.[6] If the

corporation pays him that price, it may, after discovery of the fraud, sue him for the profit thus made. Simons *v.* Vulcan Oil, etc., Co., 61 Pa. St. 202, s. c. 100 Am. Dec. 628.

[1] Hurt *v.* Salisbury, 55 Mo. 310; Taylor on Priv. Corp., § 76; Kelner *v.* Baxter, L. R. 2 C. P. 174; Scott *v.* Lord Ebury, 36 L. J. C. P. 161. See, also, Manistee Lumber Co. *v.* Union Nat. Bank, 143 Ill. 490; Hersey *v.* Tully, (Colo.) 44 Pac. R. 854.

[2] Rennie *v.* Clarke, 5 Ex. 292; Higgins *v.* Hopkins, 3 Exch. 163; Landman *v.* Entwistle, 7 Ex. 632. See note to Pittsburg Min. Co. *v.* Spooner, 74 Wis. 307, 17 Am. St. R. 149, 162, and *post*, § 190. They can not be held liable to one who knowingly agrees to accept and does accept the notes of a corporation then contemplated and afterwards organized in payment, and parol evidence is admissible to show such knowledge and agreement where the notes were signed by the company with the names and titles of the officers, especially to contradict the contention of the plaintiff that the notes of the company were accepted through a misunderstanding. Case Mfg. Co. *v.* Soxman, 138 U. S. 431, s. c. 11 Sup. Ct. R. 360.

[3] Patrick *v.* Reynolds, 1 Com. B. N. S. 727; Williams *v.* Pigott, 5 Eng. Rail. and Canal C. 544; Johnson *v.* Corser, 34 Minn. 355.

[4] Reynell *v.* Lewis, 15 Mees. & W. 517; Bailey *v.* Macaulay, 13 Q. B. 815; 1 Thomp. Corp., § 421. See Davidson *v.* Hobson, 1 Mo. App. Reporter 28. And they can not be held liable as partners under a complaint which does not proceed upon that theory but simply seeks to hold them personally liable in the event that it is ascertained that the subsequent incorporation, which was contemplated by all parties at the time of the contract, was defective, and to hold them liable as stockholders if it should be determined to be an effective incorporation. Shields *v.* Clifton, etc., Co., 94 Tenn. 123, 26 L. R. A. 509. See, also, Buffington *v.* Bardon, 80 Wis. 635, s. c. 50 N. W. R. 776.

[5] Collingwood *v.* Berkeley, 15 C. B. N. S. 145; Lake *v.* Duke of Argyll, 6 Q. B. 477.

[6] Chandler *v.* Bacon, 30 Fed. R. 538; Colt *v.* Woollaston, 2 P. Wms. 154.

scheme prove abortive, and the proposed corporation is never chartered, the expenses incurred in the attempted organization must usually be borne by the promoters,[1] and the subscribers, unless estopped by acquiescence or some act of their own, may recover back the money paid for shares of its stock.[2] The promoters are also liable to one whom they have induced to subscribe by fraudulent representations.[3]

§ 14. Contracts of promoters—When binding on corporation.—The promoters can not bind the corporation by their contracts made before the organization of the company,[4] except so far as it adopts or ratifies their acts, either directly[5] or, in

See, also, Hornblower *v.* Crandall, 7 Mo. App. 220, affirmed in 78 Mo. 581; New Sombrero Phosphate Co. *v.* Erlanger, L. R. 5 Ch. Div. 73, 36 L. T. Rep. N. S. 222; Getty *v.* Devlin, 54 N. Y. 403.

[1] Nockels *v.* Crosby, 3 Barn. & C. 814, 822; Johnson *v.* Corser, 34 Minn. 355; Sproat *v.* Porter, 9 Mass. 300. This may, however, be regulated by contract or depend upon the peculiar circumstances of each particular case.

[2] Williams *v.* Page, 24 Beav. 654; Walstab *v.* Spottiswoode, 15 Mees. & W. 501; Ashpitel *v.* Sercombe, 5 Ex. 147; Nockels *v.* Crosby, 3 Barn. & C. 814; Grand Trunk, etc., R. R. Co. *v.* Brodie, 9 Hare 823. But see Moore *v.* Garwood, 4 Ex. 681; Taylor on Priv. Corp., § 104.

[3] Miller *v.* Barber, 66 N. Y. 558; Paddock *v.* Fletcher, 42 Vt. 389; Short *v.* Stevenson, 63 Pa. St. 95; Teachout *v.* Van Hoesen, 76 Iowa 113, s. c. 1 L. R. A. 664; Cridland *v.* De Mauley, 1 De Gex & S. 459, 12 Jur. 701; Glasier *v.* Rolls, 60 L. T. N. S. 59, s. c. L. R. 42 Ch. D. 436. See, also, Brewster *v.* Hatch, 122 N. Y. 349; Capel *v.* Sim's, etc., Co., 58 L. T. N. S. 807, 57 L. J. Ch. 713; Gerhard *v.* Bates, 2 El. & Bl. 476.

[4] Munson *v.* Syracuse, etc., R. Co., 103 N. Y. 58, 29 Am. & Eng. R. Cas. 377; Perry *v.* Little Rock, etc., R. Co., 44 Ark. 383, 25 Am. & Eng. R. Cas. 44; Rockford, R. I. & St. L. R. R. Co. *v.* Sage, 65 Ill. 328; Caledonian, etc., Co. *v.* Helensburgh, 2 Macq. 391; Carmody *v.* Powers, 60 Mich. 26, 26 N. W. R. 801; New York and Hud. Riv. R. R. Co. *v.* Ketchum, 27 Conn. 170; Hill *v.* Gould, (Mo.) 30 S. W. R. 181; Abbott *v.* Hapgood, 150 Mass. 248, s. c. 15 Am. St. R. 193. A promoter can not bind the corporation by contract made in obtaining a subscription before the organization of the corporation. Joy *v.* Manion, 28 Mo. App. 55.

[5] Wood *v.* Whelen, 93 Ill. 153; Payne *v.* New South Wales, etc., Co., 10 Ex. 283; Hutchinson *v.* Surrey, etc., Association, 11 Com. B. 689; Low *v.* Connecticut, etc., 45 N. H. 370, 46 N. H. 284; Stanton *v.* New York, etc., R. R. Co., 59 Conn. 272, s. c. 21 Am. St. R. 110; Pratt *v.* Oshkosh Match Co., 89 Wis. 406, 62 N. W. R. 84; Cotting *v.* Grant, etc., Ry. Co., 65 Fed. R. 545. It has been held that the president and general manager may adopt and ratify a contract made by himself for the corporation before it was legally created, for services for the company which he would have authority to engage if no previous contract existed.

some cases, by accepting the benefits of contracts made for it.[1] The corporation can only take advantage of an executory contract entered into by the promoters by fulfilling all the engagements entered into by them on its behalf.[2] It can not, as a rule, accept and retain the benefit without assuming the burden.[3]

§ 15. **Legislative authority essential to creation of corporation.**—A corporation has been defined as a body consisting of one[4] or more persons, established by law for certain specific purposes, with the capacity of succession and with special

Oakes *v.* Cattaraugus Water Co., 143 N. Y. 430, s. c. 26 L. R. A. 544. See, also, Arapahoe Investment Co. *v.* Platt, (Colo.) 39 Pac. R. 584.

[1] Stanton *v.* New York, etc., R. R. Co., 59 Conn. 272, s. c. 21 Am. St. R. 110; Edwards *v.* Grand Junction R. Co., 1 Mylne & C. 650; Coyote Gold, etc., Co. *v.* Ruble, 8 Oregon 284; Bells Gap R. Co. *v.* Christy, 79 Pa. St. 59; Moore, etc., Co. *v.* Towers, etc., Co., 87 Ala. 206, s. c. 13 Am. St. R. 23; Schreyer *v.* Turner, etc., Co., (Oreg.) 43 Pac. R. 719; Stanley *v.* Birkenhead R. Co., 9 Simons, 264. See, also, Hall *v.* Vermont and Mass. R. R. Co., 28 Vt. 401; Bommer *v.* American Spiral, etc., Co., 81 N. Y. 468; Whitney *v.* Wyman, 101 U. S. 392; Battelle *v.* Northwestern, etc., Co., 37 Minn. 89; Frankfort, etc., Co. *v.* Churchill, 6 T. B. Mon. (Ky.) 427, s. c. 17 Am. Dec. 159; Seymour *v.* Spring Forest, etc., Ass'n, 144 N. Y. 333, s. c. 26 L. R. A. 859. In some cases, however, it is denied that a corporation can ratify a contract so as to make it relate back to its inception before the corporation came into existence. Abbott *v.* Hapgood, 150 Mass. 248, s. c. 15 Am. St. R. 193, citing Kelner *v.* Baxter, L. R. 2 Com. P. 174; Gunn *v.* London, etc., Co., 12 Com. B. N. S. 694; Melhado *v.* Porto Alegre, etc., Ry., L. R. 9 Com. P. 503; *In re* Empress, etc., Co., 16 Ch. Div. 125. But, as we understand these decisions, they do not decide that the corporation may not be held as upon a new contract from the time of its adoption. McArthur *v.* Times Printing Co., 48 Minn. 319, s. c. 51 N. W. R. 216, 31 Am. St. R. 653.

[2] Taylor on Priv. Corp., § 90; Burrows *v.* Smith, 10 N. Y. 550; Bedford etc., R. Co. *v.* Stanley, 32 L. J. Eq. 60. Unless it in some way accepts the contract so as to make it liable for failure to perform the same it can not successfully claim the right to enforce the contract to which it never became a party. Penn Match Co. *v.* Hapgood, 141 Mass. 145, s. c. 7 N. E. R. 22. See, also, Gent *v.* Manufacturer's, etc., Co., 107 Ill. 652, s. c. 8 Am. & Eng. Corp. Cas. 306; Van Buren Div. Toledo, etc., R. Co. *v.* Lamphear, 54 Mich. 575; note to Moore, etc., Co. *v.* Towers, etc., Co., 13 Am. St. R. 23.

[3] Bell's Gap R. R. Co. *v.* Christy, 79 Pa. St. 59; Low *v.* Connecticut, etc., R. R., 45 N. H. 370, 46 N. H. 284; Paxton Cattle Co. *v.* First Nat. Bank, 21 Neb. 621, s. c. 59 Am. R. 852; Grand Junction R. R. Co., 1 Mylne & C. 650. But see Weatherford, etc., R. R. Co. *v.* Granger, 86 Tex. 350; Taft *v.* Quaker, etc., Bank, 141 Pa. St. 550, s. c. 21 Atl. R. 660; Davis, etc., Co. *v.* Hillsboro, etc., Co., 10 Ind. App. 42, s. c. 37 N. E. R. 549; *Re* Rotherham, etc., Co., 50 L. T. N. S. 219.

[4] Penobscot B. Co. *v.* Lamson, 16 Me. 224.

privileges not possessed by individuals, yet acting in many respects as an individual.[1] It is necessary to the creation of the corporation that it be authorized by legislative enactment.[2] It was formerly a criminal offense to assume to act as a corporation without such authority,[3] and is still held to be so in theory in some jurisdictions.[4]

§ 16. **Creation by special charter.**—Such legislative authority was formerly given by special act, in which the powers, duties and liabilities of the specified corporation were enumerated at length, and it is still granted in this way in some states.[5] It is not necessary to the existence of a corporation that it be expressly declared a corporation in so many words.[6] It is sufficient if powers are granted to a body of men that can only be exercised by a corporation.[7] Where certain designated persons are declared to be a corporation and given corporate powers by a special charter, they have been held to become a corporation

[1] 4 Am. & Eng. Enc. 186; Morawetz on Priv. Corp. (2d ed.), §§ 1, 227; 1 Thomp. Corp., §§ 1, 2.

[2] Angell & Ames on Corporations, §§ 66–75; People *v.* Assessors, 1 Hill (N. Y.) 616; Franklin Bridge Co. *v.* Wood, 14 Ga. 80; Hoadley *v.* County Commissioners, 105 Mass. 519. Congress has power to charter railroad companies in the territories within its jurisdiction. Thomson *v.* Pac. R. R. Co., 9 Wall. (U. S.) 579; Union Pacific R. R. Co. *v.* Lincoln County, 1 Dill. (U. S.) 314; California *v.* Pacific R. R., 127 U. S. 1, 39, s. c. 8 Sup. Ct. R. 1073.

[3] Duvergier *v.* Fellows, 5 Bing. 248, 5 Moore & P. 403.

[4] People *v.* Ridgley, 21 Ill. 65. It is so declared by statute in Iowa. Rev. Stat. Iowa, 1888, § 1072.

[5] An act declaring that "a company is hereby created called the St. Joseph and Iowa Railroad Company," and naming the first board of directors, was held to be a present grant of corporate powers, of which the construction and operation of part of its road by such company was a sufficient acceptance. Roosa *v.* St. Joseph, etc., R. Co., 114 Mo. 508. See, also, Little Rock, etc., R. Co. *v.* Little Rock, etc., Co., 36 Ark. 663, 684; Stoops *v.* Greensburgh, etc., Co., 10 Ind. 47.

[6] Denton *v.* Jackson, 2 Johns, Ch. (N. Y.) 320; Com. *v.* West Chester Co., 3 Grant Cas. (Pa.) 200.

[7] Atkinson *v.* Bemis, 11 N. H. 44; Coburn *v.* Ellenwood, 4 N. H. 101; Delaware, etc., Canal Co. *v.* Commonwealth, 50 Pa. St. 399; Dunn *v.* Oregon University, 9 Ore. 357; Inhabitants of Springfield *v.* Miller, 12 Mass. 415; Liverpool Ins. Co. *v.* Massachusetts, 10 Wall. (U. S.) 566; Blanchard *v.* Kaull, 44 Cal. 440; Dean *v.* Davis, 51 Cal. 406. But see State *v.* Davis, 23 Ohio St. 434; Neil *v.* Board, 31 Ohio St. 15; Shelton *v.* Banks, 10 Gray (Mass.) 401; Walsh *v.* New York and Brooklyn Bridge, 96 N. Y. 427.

eo instanti.[1] But a man can not be compelled to become a member of a private corporation against his will.[2]

§ 17. **Acceptance of charter.**—For the reason stated in the last section, a special charter does not, ordinarily, create an effective private corporation until it is accepted.[3] But, as special charters are usually for the benefit of those who are named, an acceptance may be presumed in many cases. Thus, the fact that they had applied for the charter,[4] that they afterwards exercised the powers conferred,[5] or the like,[6] is strong, if not conclusive, evidence of an acceptance. It is not, therefore, essential that an express acceptance of the charter should appear in the records of the corporation.[7] The acceptance must usually be unconditional, for a charter can not be accepted in part and rejected in part, but must either be accepted or rejected as offered.[8] Although directors may sometimes bind a corporation

[1] Little Rock, etc., R. R. Co. *v.* Little Rock, etc., R. Co., 36 Ark. 663, 684; Talledega Ins. Co. *v.* Landers, 43 Ala. 115; Stoops *v.* Greensburgh, etc., Plank Road Co., 10 Ind. 47. Compare Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518; State *v.* Dawson, 16 Ind. 40.

[2] 2 Kent. Com. 277; Ellis *v.* Marshall, 2 Mass. 269, s. c. 3 Am. Dec. 49; Lauman *v.* Railroad Co., 30 Pa. St. 46, s. c. 72 Am. Dec. 685.

[3] Lexington & West Cambridge R. R. Co. *v.* Chandler, 13 Met. (Mass.) 311; Dartmouth College *v.* Woodward, 4 Wheat. (U. S.) 518, 708; Haslett *v.* Wotherspoon, 1 Strobh. Eq. 209; Quinlan *v.* Houston, etc., Co., (Tex.) 34 S. W. R. 738.

[4] City of Atlanta *v.* Gate City, etc., Co., 71 Ga. 106; Astor *v.* N. Y. Railroad Co., 48 Hun (N. Y.) 562; Middlesex, etc., *v.* Davis, 3 Met. (Mass.) 137. But the presumption of acceptance arising from the application for the charter may, it seems, be rebutted by proof that no steps were taken to organize or proceed under it, although a great many years had elapsed since it was granted. Newton *v.* Carbery, 5 Cranch C. C. (U. S.) 632.

[5] Illinois River R. R. Co. *v.* Zimmer, 20 Ill. 654; Eastern R. R. Co. *v.* Boston and Maine R. R., 111 Mass. 125; Newton *v.* Carbery, 5 Cranch C. C. (U. S.) 632; Talledega Ins. Co. *v.* Landers, 43 Ala. 115.

[6] Taylor *v.* Newberne, 2 Jones Eq. (N. Car.) 141; Gleaves *v.* Turnpike Co., 1 Sneed (Tenn.) 491; McKay *v.* Beard, 20 S. Car. 156; St. Paul Division *v.* Brown, 11 Minn. 356; Snead *v.* Indianapolis, etc., R. R. Co., 11 Ind. 104.

[7] Russell *v.* McLellan, 14 Pick. (Mass.) 63. The question of acceptance is usually a question of fact for the jury. Hammond *v.* Straus, 53 Md. 1.

[8] Lyons *v.* Orange, etc., R. R. Co., 32 Md. 18; Kenton County Court *v.* Bank Lick, etc., Co., 10 Bush (Ky.) 529; Rex *v.* Westwood, 2 Dow & Cl. 21, s. c. 7 Bing. 1, 90.

by acts performed by them in other states than that in which the corporation was created, yet the meetings of the stockholders or corporators must usually be held within the jurisdiction creating the corporation, and it has been held that the acceptance of a charter by the corporators in their constituent capacity at a meeting held in another state for the purpose of organization is ineffective.[1] If a charter is granted by the legislature without any application upon the part of those to whom it is granted, it is regarded as a mere offer upon the part of the state, and may be withdrawn at any time before it is accepted.[2] When accepted, a charter takes effect immediately,[3] unless otherwise provided.

§ 18. **Incorporation under general laws.**—To prevent the grant of special and exclusive privileges, to secure uniformity in the powers of all corporations of the same class and render them subject to all such general laws as may be enacted for the government of corporations of that class, and to secure to the state the right to amend or repeal the charter at pleasure, provision is made for the creation of corporations by general laws in most of the states,[4] in several of which the constitutions forbid the passage of any special act chartering railroads.[5]

[1] Miller *v.* Ewer, 27 Me. 509, s. c. 46 Am. Dec. 619, and note; Smith *v.* Silver Valley, etc., Co., 64 Md. 85, s. c. 54 Am. R. 760. See, also, Freeman *v.* Machias, etc., Co., 38 Me. 343; Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 519; Aspinwall *v.* Ohio, etc., R. R. Co., 20 Ind. 492, s. c. 83 Am. Dec. 329. But compare Missouri Lead, etc., Co. *v.* Reinhard, 114 Mo. 218, s. c. 35 Am. St. R. 746.

[2] State v. Dawson, 16 Ind. 40. See, also, Cincinnati, H. & I. R. R. Co. *v.* Clifford, 113 Ind. 460, 463, 464; State *v.* Bull, 16 Conn. 179, 191; Mississippi Society *v.* Musgrove, 44 Miss. 820, s. c. 7 Am. R. 723; Chesapeake, etc., Co. *v.* Baltimore, etc., R. R. Co., 4 G. & J. (Md.) 1; Illinois River R. R. Co. *v.* Zimmer, 20 Ill. 654.

[3] Kaiser *v.* Lawrence Savings Bank, 56 Iowa 104, s. c. 41 Am. R. 85. See, also, Coleman *v.* Coleman, 78 Ind. 344; Cincinnati, H. & D. R. R. Co. *v.* Cole, 29 Ohio St. 126.

[4] Morawetz on Private Corp. (2d ed.) § 12; Stimson's Am. St. Law, § 8520; Pierce on Railroads, 3; Cook on Stockholders, §§ 6, 33 and 34; 1 Thomp. Corp., § 540.

[5] This is true of Arkansas, Colorado, California, Illinois, Indiana, Kansas, Louisiana, Mississippi, Missouri, Nebraska, New Jersey, Texas, New York, Michigan, Minnesota, Nevada, Maryland, Maine, Oregon, Ohio, Wisconsin and the territories. Stimson's Am. St. Law, § 441; 1 Thomp. Corp., §§ 539, 540; 1 Beach on Private Corporations, § 8. The Kansas act in relation to

These general laws usually provide for the filing of articles of association, conforming to certain statutory requirements, by persons who have subscribed stock in the projected company. The persons subscribing to the articles of incorporation need not be residents of the state issuing the charter, unless the statute requires it.[1] When the requisite stock is subscribed, and the articles signed and filed as provided (generally with the secretary of state) the subscribers and stockholders usually become a corporation, clothed with the powers and charged with the duties and liabilities of corporations.[2] Proof of the act of incorporation and of user or corporate action under it is generally sufficient evidence of the existence of the corporation,[3] and a proper certificate of incorporation, or copy of

the Missouri, Kansas and Texas Railway Company and the Union Pacific Railway Company, purporting to convey and extend all the rights possessed to any part of their line to their entire road, and to give a right of way over all lands as full as that enjoyed over other lands under other acts, is in violation of Kan. Const., Art. 12, § 1, providing that the legislature shall pass no special act conferring corporate powers. Roberts *v.* Missouri, K. & T. R. Co., 43 Kan. 102, 43 Am. & Eng. R. Cas. 532, 22 Pac. R. 1006.

[1] Central R. Co. *v.* Penn. R. Co., 4 Stewart (31 N. J. Eq.) 475; National Docks R. Co. *v.* Central R. Co., 5 Stewart (32 N. J. Eq.) 755; Detwiller *v.* Commonwealth, 131 Pa. St. 614, s. c. 7 L. R. A. 357; note to State *v.* Manufacturers, etc., Ass'n, 24 L. R. A. 252; Commonwealth *v.* Hemingway, 131 Pa. St. 614, s. c. 7 L. R. A. 360.

[2] Clarkson *v.* Hudson River R. Co., 12 N. Y. 304; Cincinnati, etc., R. Co. *v.* Danville, etc., R. Co., 75 Ill. 113; Hunt *v.* Kansas and Missouri Bridge Co., 11 Kan. 412; Hoagland *v.* Cincinnati, etc., Railroad Co., 18 Ind. 452; James *v.* Greensboro, etc., Co., 47 Ind. 379. The requirements of the statute must be substantially complied with. People *v.* Chambers, 42 Cal. 201; McCallion *v.* Hibernia, etc., Society, 70 Cal. 163, s. c. 12 Pac. R. 114; Reed *v.* Richmond Street R. Co., 50 Ind. 342; Abbott *v.* Omaha, etc., Co., 4 Neb. 416; Eaton *v.* Aspinwall, 19 N. Y. 119; People *v.* Cheeseman, 7 Colo. 376, 16 Am. & Eng. R. Cas. 400; Childs *v.* Hurd, 32 W. Va. 66, s. c. 9 S. E. R. 362. But slight omissions in the certificate will not vitiate it. People *v.* Stockton, etc., R. Co., 45 Cal. 306; Commonwealth *v.* Central Pass. R. Co., 52 Pa. St. 506; Rogers *v.* Danby Universalist Society, 19 Vt. 187; Eakright *v.* Logansport, etc., R. R. Co., 13 Ind. 404; Buffalo, etc., R. Co. *v.* Cary, 26 N. Y. 75. The fact that nearly all the officers of a railroad company are also officers of other railroad companies does not affect the corporate existence of the former company, and, under the Kansas law, its existence dates from the filing of its charter. Southern Kan. & P. R. Co. *v.* Towner, 41 Kan. 72, s. c. 21 Pac. R. 221.

[3] Braintree, etc., Co. *v.* Braintree, 146 Mass. 482; Bank *v.* International

the original articles of incorporation, is, in most states, *prima facie* evidence thereof;[1] but a certificate which fails to comply, in substance, with the statutory requirements is not proof of a valid corporate existence.[2] The articles of incorporation must specify the objects of the corporation in at least substantial compliance with the statute,[3] the place in which its operations are to be carried on or in which its principal office is located,[4] the amount of the capital stock,[5] and the names and residences of the incorporators,[6] and the like.[7] In the case of a railroad company it is also usually provided that the line of the road shall be more or less definitely described, but where the statute merely requires that the termini should be stated and the counties named into or through which it is intended to pass, it is sufficient to so describe the line by designating such places and naming each county into or through which it is expected to run.[8] Most of the statutes require that the articles of incor-

Bank, 21 N. Y. 542; Columbia, etc., Co. *v.* Meier, 39 Mo. 53; Wood *v.* Wiley, etc., Co., 56 Conn. 87, s. c. 13 Atl. R. 137.

[1] 1 Thomp. Corp., § 220.

[2] McCallion *v.* Hibernia, etc., Society, 70 Cal. 163, s. c. 12 Pac. R. 114; People *v.* Selfridge, 52 Cal. 331; Fifth Baptist Church *v.* Baltimore, etc., R. R. Co., 4 Mackey (D. C.) 43.

[3] West *v.* Bullskin, etc., Co., 32 Ind. 138; O'Reiley *v.* Kankakee, etc., Co., 32 Ind. 169; Attorney-General *v.* Lorman, 59 Mich. 157; State *v.* Central Ohio, etc., Ass'n, 29 Ohio St. 399.

[4] Harris *v.* McGregor, 29 Cal. 124; People *v.* Beach, 19 Hun (N. Y.) 259; Clegg *v.* Hamilton, etc., Co., 61 Iowa 121.

[5] State, *ex rel.*, *v.* Shelbyville, etc., Co., 41 Ind. 151; Heinig *v.* Adams, etc., Co., 81 Ky. 300.

[6] Busenback *v.* Attica., etc., Co., 43 Ind. 265; Vawter *v.* Franklin College, 53 Ind. 88. But the residence need not be stated unless the statute requires it. State, *ex rel.*, *v.* Foulkes, 94 Ind. 493. It is sufficient if the initials of the Christian name be used. State *v.* Beck, 81 Ind. 500.

[7] State *v.* Central Ohio, etc., Ass'n, 29 Ohio St. 399; New Orleans, etc., R. R. Co. *v.* Frank, 39 La. Ann. 707, s. c. 2 So. R. 310, s. c. 30 Am. & Eng. R. R. Cas. 275; Piper *v.* Rhodes, 30 Ind. 309.

[8] Board *v.* Center Tp., 105 Ind. 422, 441. Where the line is described with reasonable certainty and the termini are shown to be in the state in which the company is incorporated, it has been held that the fact that the line as described runs partly through another state does not invalidate the incorporation. Piedmont, etc., R. R. Co. *v.* Speelman, 67 Md. 260, s. c. 30 Am. & Eng. R. R. Cas. 316. An approximate estimate of the length of the road is sufficient where the length is required to be stated. Buffalo, etc., R. R. Co., *v.* Hatch, 20 N. Y. 157. And indefiniteness in the description of the route may be rendered immaterial by legislative recognition, and the con-

poration shall be signed and acknowledged by a certain number of incorporators,[1] and that the certificate or copy shall be filed with the secretary of state, or other officer, or published in some specified manner. In some jurisdictions the failure to comply with such a requirement has been held not to vitiate the organization or prevent the corporation from coming into existence,[2] but much depends upon the language of the particular statute, and if the requirement is a condition precedent it must be complied with.[3] It is, indeed, the general rule that all conditions precedent must be substantially performed.[4] Thus, where the statute provides that a certain amount of stock shall be subscribed before articles of incorporation can be filed, or that a certain percentage of the capital stock shall be paid in before the articles are filed, the statute must be complied with before a corporation can be legally organized.[5] In the

struction and operation of the road. Cayuga Lake R. R. Co. *v.* Kyle, 5 Thomp. & C. (N. Y.) 659, s. c. 64 N. Y. 185. See *post*, § 36.

[1] People *v.* Montecito, etc., Co., 97 Cal. 276, s. c. 33 Am. St. R. 172; State *v.* Critchett, 37 Minn. 13; Indianapolis, etc., Mining Co. *v.* Herkimer, 46 Ind. 142; Corey *v.* Morrill, 61 Vt. 598. In such a case one who merely signs the articles of association without acknowledging them does not become a stockholder and is not bound by the subscription. Coppage *v.* Hutton, 124 Ind 401.

[2] Holmes *v.* Gilliland, 41 Barb. (N. Y.) 568; Granby Mining Co. *v.* Richards, 95 Mo. 106; *In re* Shakopee, etc., Co,, 37 Minn. 91, s. c. 33 N. W. R. 219. See, also, Vanneman *v.* Young, 52 N. J. L. 403, s. c. 3 Lewis Am. R. R. & Corp. R. 660, and note.

[3] Bigelow *v.* Gregory, 73 Ill. 197; Childs *v.* Hurd, 32 W. Va. 66; Martin *v.* Deetz, 102 Cal. 55, s. c. 41 Am. St. R. 151; Indianapolis, etc., Mining Co. *v.* Herkimer, 46 Ind. 142; State *v.* Critchett, 37 Minn. 13; Field & Co. *v.* Cooks, 16 La. Ann. 153; Clegg *v.* Hamilton, 61 Iowa 121; Capp & McCreary *v.* Hastings, etc., Co., 40 Neb. 470, 24 L.R. A. 259; Hurt *v.* Salisbury, 55 Mo. 310. Where, however, the articles are properly delivered to the designated officer for record, the fact that he records them in the wrong book will not invalidate the incorporation. Walton *v.* Riley, 85 Ky. 413, s. c. 3 S. W. R. 605. See, also, State *v.* Foulkes, 94 Ind. 493.

[4] Mokelumne Hill, etc., Co. *v.* Woodbury, 14 Cal. 424, s. c. 73 Am. Dec. 658; Attorney General *v.* Hanchett, 42 Mich. 436; Danbury, etc., R. R. Co. *v.* Wilson, 22 Conn. 435; Dutchess, etc., R. R. Co. *v.* Mabbett, 58 N. Y. 397; Garnett *v.* Richardson, 35 Ark. 144.

[5] State, *ex rel.*, *v.* St. Paul Co., etc., 92 Ind. 42; State, *ex rel.*, *v.* Dillon, 36 Ind. 388; Holman *v.* State, 105 Ind. 569; People *v.* Chambers, 42 Cal. 201. But where this is not required to precede the filing of the articles there may be a corporate existence sufficient, at least, to withstand a collateral attack. Eastern Plank Road Co.

absence, however, of any provision upon the subject in the statute or contract of subscription, it has been held not to be necessary that the entire capital stock should have been subscribed for before the incorporation.[1]

§ 19. **Perfecting the organization.**—Under some of the statutes the names of those who are to serve as directors for the first year must be stated in the articles of incorporation, and where such or similar provisions are found it would seem that there must be a preliminary meeting and organization, or at least a selection in some manner of those who are to serve as directors. But, ordinarily, the articles of incorporation are first executed and filed and a meeting of the stockholders or members is then held for the purpose of adopting by-laws, electing directors, and perfecting the corporate organization,[2] although, as already stated, the corporation comes into existence, under many of the statutes, as soon as the articles of incorporation are properly filed. The directors then usually hold a directors' meeting and elect the officers. This, ordinarily, completes the corporate organization, although there may be other statutory requirements that should be complied with before the corporation is ready to do business.[3]

v. Vaughan, 14 N. Y. 546; Palmer *v.* Lawrence, 3 Sandf. (N. Y.) 161. See, also, Boston, etc., Co. *v.* Moring, 15 Gray (Mass.) 211; McClinch *v.* Sturgis, 72 Me. 288; Cheraw, etc., R. R. Co. *v.* White, 14 S. C. 51; People *v.* Stockton, etc., R. R. Co., 45 Cal. 306; Buffalo, etc., R. R. Co. *v.* Hatch, 20 N. Y. 157; Ogdensburgh, etc., R. R. Co. *v.* Frost, 21 Barb. (N. Y.) 541; Spartanburg, etc., R. R. Co. *v.* Ezell, 14 S. C. 281.

[1] Schenectady, etc., Plank Road Co. *v.* Thatcher, 11 N. Y. 102; Johnson *v.* Kessler, 76 Iowa 411, s. c. 41 N. W. R. 57; Massey *v.* Citizens, etc., Assn. 22 Kan. 624; Minor *v.* Mechanics' Bank, 1 Pet. (U. S.) 46; Bolling *v.* Le Grand, 87 Ala. 482, s. c. 6 So. R. 332; Waterford, etc., R. R. Co. *v.* Dalbiac, 20 L. J. Exch. 227; Macdougall *v.* Jersey, etc., Co., 2 H. & Miller 528. But see Shurtz *v.* S. & T. R. R. Co., 9 Mich. 269; Cabot, etc., Bridge *v.* Chapin, 6 Cush. (Mass.) 50; Salem Mill Dam Co. *v.* Ropes, 6 Pick. (Mass.) 23; Worcester and Nashua R. R. Co. *v.* Hinds, 8 Cush. (Mass.) 110; Livesey *v.* Omaha, etc., Co., 5 Neb. 50, and compare City Hotel *v.* Dickinson, 6 Gray (Mass.) 586; Boston, etc., R. R. Co. *v.* Wellington, 113 Mass. 79. See *post*, § 111.

[2] See Walker *v.* Devereaux, 4 Paige Ch. (N. Y.) 229; Lehman *v.* Warner, 61 Ala. 455; McClinch *v.* Sturgis, 72 Me. 288.

[3] In the recent case of Wechselberg *v.* Flour City Nat. Bank, 64 Fed. R. 90, it was held that, under the Wis-

§ 20. **Defective organization—Waiver—Collateral attack.** —If the organization be defective, this fact can not, as a rule, be taken advantage of in any collateral action,[1] for mere irregularities may be waived by the state,[2] which alone can object to

consin statute, where the requisite number of persons duly signed, acknowledged and filed articles of incorporation, but did not subscribe for or issue any stock or do anything else to perfect the organization, the corporation had only a qualified existence without the full privileges of a complete incorporation and organization, and that one of said persons was bound with the others for debts incurred by them in the name of the corporation, although he did not actively participate in their acts. See, also, Anvil Mining Co. *v.* Sherman, 74 Wis. 226, s. c. 42 N. W. R. 226; State *v.* Fidelity, etc., Co., 49 Ohio St. 440, 31 N. E. R. 658, s. c. 6 Lewis Am. R. R. & Corp. R. 599. As a general rule, however, conditions to be performed after incorporation, in order to carry on business, are not conditions precedent in such a sense as to affect the corporate existence. Spartanburg, etc., R. R. Co. *v.* Ezell, 14 S. Car. 281; Harrod *v.* Hamer, 32 Wis. 162; Hughesdale, etc., Co. *v.* Vanner, 12 R. I. 491; Whitney *v.* Wyman, 101 U. S. 392; Hammond *v.* Straus, 53 Md. 1. And see Rutherford *v.* Hill, 22 Ore. 218; Cincinnati, H. & I. R. R. Co. *v.* Clifford, 113 Ind. 460.

[1] Aurora & C. R. Co. *v.* City of Lawrenceburg, 56 Ind. 80; Board of Commissioners *v.* Hall, 70 Ind. 469; Illinois Grand Trunk R. Co. *v.* Cook, 29 Ill. 237; Brown *v.* Calumet R. Co., 125 Ill. 600, 18 N. E. 283; Eaton *v.* Aspinwall, 19 N. Y. 119; Lahman *v.* Warner, 61 Ala. 455; Baltimore, etc., R. R. Co. *v.* Fifth Baptist Church, 137 U. S. 568, s. c. 11 Supr. Ct. R. 185; Taggart *v.* Western Md. R. Co., 24 Md. 563; Swartwout *v.* Mich. A. L. Co., 24 Mich. 389, 394; Hanover Junction, etc., R. Co. *v.* Haldeman, 82 Pa. St. 36, 46; Frost *v.* Frostburg Coal Co., 24 How. 278, 283; Gill *v.* Kentucky, etc., Co., 7 Bush (Ky.) 635; note to People *v.* Montecito Water Co. (Cal.) 33 Am. St. R. 172, 180, *et seq.*; note to Vanneman *v.* Young, 3 Lewis Am. R. R. & Corp. R. 660, 662, *et seq.*

[2] If the state fail for eight years to avail itself by *quo warranto*, of a defect in articles of association consisting in an uncertain statement of a terminus of a road, it can not do it afterward. State *v.* Bailey, 19 Ind. 452. Under the statutes of Tennessee which provide that a railroad company's charter shall first be registered in the county where the company's principal office is; that it shall then be transmitted to the secretary of state, who shall affix his certificate of registration and the great seal of state, and that these shall be registered where the charter was originally registered; and that this shall complete the company's corporate character, it has been held that, where a company was organized to run a railroad through several counties, the county where its charter is registered should be deemed to have been determined on as the location of the principal office, and holding a directors' and stockholders' meeting in another county will not change the rule. Anderson *v.* Middle and East Tennessee Cent. R. Co., 91 Tenn. 44, 52 Am. & Eng. R. Cas. 149, s. c. 17 S. W. 803.

the unauthorized assumption of corporate powers.[1] Legislative recognition of a corporation as a subsisting one is such a waiver,[2] for the legislature has the same right to ratify and confirm an irregularly organized corporation that it has to create a new one,[3] but mere legislative recognition only operates to cure defects in the organization, and not to create a new corporation where there is not even a *de facto* organization upon which it can act.[4]

[1] Hay *v.* People, 59 Ill. 94; Reisner *v.* Strong, 24 Kan. 410, 10 Am. & Eng. R. Cas. 335.

[2] McAuley *v.* Columbus, etc., R. Co. 83 Ill. 348; McCartney *v.* Chicago, etc., R. Co. 112 Ill. 611, 29 Am. & Eng. R. Cas. 326; Atlantic, etc., R. Co. *v.* St. Louis, 66 Mo. 228; Cowell *v.* Colorado Springs Co., 3 Colo. 82, 100 U. S. 55; Mead *v.* New York, etc., R. Co., 45 Conn. 199; Black River, etc., R. Co. *v.* Barnard, 31 Barb. (N. Y.) 258; Koch *v.* North Ave. Ry. Co., 75 Md. 222.

[3] Mitchell *v.* Deeds, 49 Ill. 416, 95 Am. Dec. 621. See, also, Fisher *v.* Evansville, etc., R. R. Co., 7 Ind. 407, 413; Comanche County *v.* Lewis, 133 U. S. 198, s. c. 10 Supr. Ct. R. 286, 288. See, generally, Hogue *v.* Capital, etc., Bank, (Neb.) 66 N. W. R. 1036; People *v.* Barker, 39 N. Y. S. 88; Mylrea *v.* Superior, etc., R. Co., (Wis.) 67 N. W. R. 1138.

[4] Attorney General *v.* Railroad Cos., 35 Wis. 425, 602; State *v.* Ford Co., 12 Kan. 441, approved in Comanche County *v.* Lewis, 133 U. S. 198, s. c. 10 Supr. Ct. R. 286, 288. See, also, Oroville, etc., R. R. Co. *v.* Supervisor, 37 Cal. 354. On this theory it is held that a statute curing defects in the organization of a *de facto* corporation does not violate a constitutional provision prohibiting the *creation* of a corporation by special legislation. Central Agricultural Assn. *v.* Alabama, etc., Co., 70 Ala. 120. Where articles of incorporation filed are void, they can not be made good by amendment. State, *ex rel.* Clapp *v.* Critchett, 37 Minn. 13, 23 N. W. R. 767. See, generally, Pearsall *v.* Great Northern, etc., R. Co., 73 Fed. R. 933; State *v.* Webb, (Ala.) 20 So. R. 462; Willis *v.* Chapman, (Vt.) 35 Atl. R. 459.

CHAPTER III.

LEGAL STATUS.

§ 21. As individual, person, citizen.
22. Corporation confined to jurisdiction creating it—Business elsewhere—Comity.
23. Citizenship—Removal of causes.
24. Residence and domicile—Jurisdiction.
25. Federal corporations.
26. Railroad in more than one state—Citizenship.
27. Control of railroads in more than one state.
28. Result of consolidation or concurrent action of several states creating new corporations.
29. Railroad only a citizen or domestic corporation of the states that charter it—Effect of mere license.
30. Foreign corporations—Condition of admission to state.
31. Railroads as property.
32. Railroads as monopolies.
33. Railroads as public highways.

§ 21. **As individual, person, citizen.**—A railroad company may be regarded as an individual, in the sense that it may, unless restrained by law, make contracts,[1] sue and be sued,[2] buy and sell property,[3] in furtherance of its business, and in general carry on business much the same as if it were a natural person. It is a "person" within the meaning of the fourteenth amendment to the United States Constitution forbidding a state to deny to any person the equal protection of the laws;[4] and, generally, is to be treated as a person within the meaning

[1] See *post*, chapter on Contracts.

[2] See *post*, chapter on Actions by and against Railroad Companies.

[3] Richardson *v.* Mass., etc., Association, 131 Mass. 174; Crawford *v.* Longstreet, 43 N. J. L. 325; Graham *v.* Railroad Co., 102 U. S. 148, 161. As elsewhere shown, however, it can not, without legislative authority, sell property necessary for it to keep in order to perform its duties to the public.

[4] Santa Clara Co. *v.* Southern P. R. Co., 118 U. S. 394; 24 Am. & Eng. R. Cas. 523; San Mateo Co. *v.* Southern P. R. Co., 7 Sawy. (U. S.) 517; Minneapolis, etc., R. R. Co. *v.* Beckwith, 129 U. S. 26; Pembina, etc., Co. *v.* Pennsylvania, 125 U. S. 181; Missouri Pac. R. R. Co. *v.* Mackey, 127 U. S. 205.

of statutes conferring rights and remedies on "persons,"[1] unless it is evident that the intention of the legislature was that it should not be so considered.[2] It is not, however, a citizen entitled to the privileges and immunities of citizens of the several states within the meaning of the constitution of the United States.[3] But it is, for jurisdictional and other purposes, regarded as a citizen of the state chartering it.[4]

§ 22. **Corporation confined to jurisdiction creating it—Business elsewhere—Comity.**—In common with other corporations, a railroad company exists only by force of law, and can not remove beyond the jurisdiction of that law,[5] nor can it exercise any rights or privileges in a foreign jurisdiction unless it is admitted to do so by express or implied permission of the foreign state,[6] or except, perhaps, as an instrument of interstate commerce. A corporation, where not restrained by the

[1] Louisville Safety Vault Co. *v.* Louisville & N. R. R. Co., (Ky.) 14 L. R. A. 579, and note; Boyd *v.* Craydon R. Co., 4 Bing. N. C. 669; Mott *v.* Hicks, 1 Cow. (N. Y) 513; State of Indiana *v.* Woram, 6 Hill (N. Y.) 33, s. c. 40 Am. Dec. 378; State *v.* Nashville University, 4 Humph. (Tenn.) 157; Field *v.* N. Y. Central R. R. Co., 29 Barb. (N. Y.) 176; Wright *v.* N. Y. Central R. R. Co., 28 Barb. (N. Y.) 80; Mineral Point R. R. Co. *v.* Keep, 22 Ill. 9; Lehigh Bridge Co. *v.* Lehigh Coal Co., 4 Rawle (Pa.) 9. So, under statutes imposing taxes, People *v.* Utica Ins. Co., 15 John (N. Y.) 358;—relating to usury, Thornton *v.* Bank of Washington, 3 Pet. (U. S.) 36; Grand G. B. *v.* Archer, 16 Miss. 151; Commercial Bank *v.* Nolan, 7 How. (Miss.) 508;—relating to limitations, Olcott *v.* Tioga R. R. Co., 20 N. Y. 210;—relating to penal offenses, United States *v.* Amedy, 11 Wheat (U. S.) 392. See generally, as to what is and what is not a denial of equal protection of the laws within the meaning of the constitution, note to Louisville Safety Vault Co. *v.* Louisville & N. R. R. Co., 14 L. R. A. 579.

[2] Commonwealth *v.* Phenix Bank, 11 Met. (Mass.) 129.

[3] Paul *v.* Virginia, 8 Wall. 168; Chicago, etc., R. Co. *v.* Whitton, 13 Wall. (U. S.) 270; Woodward *v.* Commonwealth, (Ky.) 35 Am. & Eng. R. R. Cas. 498; Norfolk, etc., R. Co. *v.* Pennsylvania, 136 U. S. 114; Pembina, etc., Co. *v.* Pennsylvania, 125 U. S. 181; State *v.* Delaware, etc., Co., (Del.) 31 Atl. R. 714.

[4] See *post*, § 23.

[5] Miller *v.* Ewer, 27 Me. 509; Paul *v.* Virginia, 8 Wall. (U. S.) 168; County of Allegheny *v.* Cleveland, etc., R. Co., 51 Pa. St. 228; Aspinwall *v.* Ohio, etc., R. Co., 20 Ind. 492; note to Young *v.* South Tredegar, etc., Co., 4 Am. St. R. 752, 760; Connor *v.* Vicksburg, etc., R. R. Co., 1 L. R. A. 331, and note.

[6] Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 519; Baltimore, etc., R. Co. *v.* Glenn, 28 Md. 287; Atchison, etc., R. Co. *v.* Fletcher, 35 Kan. 236; Demarest *v.* Flack, 128 N. Y. 205, 28 N. E. R. 645; Paul *v.* Virginia, 8 Wall. (U. S.) 168. Duke *v.* Taylor, (Fla.) 19 So. R. 172.

law of its creation, may, however, do business and perform corporate acts in any state which will permit it to do so.[1] By the comity of nations, such permission is always implied unless there is an affirmative refusal.[2]

§ 23. **Citizenship—Removal of causes.**—It is generally held that a corporation may be adopted by the legislation of a state, so as to become a citizen thereof, for the purposes of jurisdiction, where that is plainly the legislative intent.[3] It has been held in Virginia that a corporation, by leasing and operating a road in a foreign state becomes a citizen of that state for purposes of jurisdiction; and that a suit against it for a cause of action arising in that state could not be removed from the state courts to the federal courts.[4] But the weight of authority is that a railroad company is a citizen of the state by which it is created, for the purposes of jurisdiction of the United States courts, and may take advantage of the constitutional privilege of conducting its suits against the citizens of other states in those courts.[5] And a foreign corporation can not be deprived

[1] Atchison, etc., R. Co. *v.* Fletcher, 35 Kan. 236; Dodge *v.* Council Bluffs, 57 Iowa 560; Reichwald *v.* Commercial Hotel Co., 106 Ill. 439; Miller *v.* Ewer, 27 Me. 509; Bank of Augusta, *v.* Earle, 13 Pet. (U. S.) 519; Christian Union *v.* Yount, 101 U. S. 352; Newburg Petroleum Co. *v.* Weare, 27 Ohio St. 343; Williams *v.* Creswell, 51 Miss. 817; Baltimore, etc., R. Co. *v.* Glenn, 28 Md. 287; Blair *v.* Perpetual Ins. Co., 10 Mo. 559; Ohio Life Ins., etc., Co. *v.* Merchants Ins., etc., Co., 11 Humph. (Tenn.) 1; Thompson *v.* Waters, 25 Mich. 214; Merrick *v.* Van Santvoord, 34 N. Y. 208.

[2] Cowell *v.* Colorado Springs Co., 100 U. S. 55, 3 Colo. 82; Christian Union *v.* Yount, 101 U. S. 352, 356; Reichwald *v.* Commercial Hotel Co., 106 Ill. 439; Baltimore, etc., R. Co. *v.* Glenn, 28 Md. 287. See note to Cone, etc., Co. *v.* Poole, (S. C.) 24 L. R. A. 289.

[3] Williams *v.* Missouri, etc., Railroad Co., 3 Dill (U. S.) 267; Ohio, etc., Railroad Co. *v.* Wheeler, 1 Black (U. S.) 286; Railroad Co. *v.* Harris, 12 Wall. (U. S.) 65; Railway Co. *v.* Whitton, 13 Wall. (U. S.) 270; Railroad Co. *v.* Vance, 96 U. S. 450. A railroad corporation of another state operating a railroad in the state under a lease may be so adopted. Western, etc., R. Co. *v.* Roberson, 61 Fed. R. 592.

[4] Baltimore, etc., R. Co. *v.* Wightman, 29 Gratt. (Va.) 431; Baltimore, etc., R. Co. *v.* Noell, 32 Gratt. (Va.) 394. *Contra:* See Wilkinson *v.* Delaware, etc., R. Co., 22 Fed. R. 353, 20 Am. & Eng. R. Cas. 597, and cases cited.

[5] Louisville, etc., R. Co. *v.* Letson, 2

of the right of removal to the federal courts by state legislation.[1] Any officer authorized to act for it in that behalf may make the necessary affidavit and procure the transfer to the federal courts of any suit begun against it in the courts of a state wherein it is not domiciled.[2] Where a railroad corporation is chartered by two or more states, it is for most purposes a citizen of each.[3]

§ 24. **Residence and domicile—Jurisdiction.**—A railroad corporation is a legal entity, or person, capable of having a home, or domicile, which is always within the state, or sovereignty by which it is created.[4] And it has recently been settled by the Supreme Court of the United States that, under the act of congress of March 3, 1887, as corrected by the act of August 13, 1888, a corporation incorporated in one state only is not a citizen nor a resident of another state, although it has a place of business in the latter, and can not be sued in a United States circuit court of the latter state, which is in a different district from that in which the company is incorporated, by a citizen of a third state.[5] Like a natural person, however,

How. (U. S.) 497; Marshall *v.* Baltimore R. Co., 16 How. (U. S.) 314; Railroad Co. *v.* Harris, 12 Wall. (U. S.) 65; Quigley *v.* Cent. Pac. Co. 11 Nev. 350; Ohio, etc., R. Co. *v.* Wheeler, 1 Black. (U. S.) 286; Railroad Co. *v.* Koontz, 104 U. S. 5; William *v.* Missouri, etc., R. Co., 3 Dill. (U. S.) 267; Wilkinson *v.* Delaware, etc., R. Co., 22 Fed. R. 353; Callahan *v.* Louisville, etc., R. Co., 11 Fed. R. 536.

[1] State legislation seeking to deprive foreign corporations of the right to resort to the federal courts must be held inoperative where such right is conferred by the constitution and laws of the United States. Reece *v.* Newport News, etc., Co., 32 W. Va. 164, 9 S. E. R. 212, 3 L. R. A. 572, 5 Ry. & Corp. L. J. 515; Chicago & N. W. R. R. Co. *v.* Whitton, 13 Wall. (U. S.) 270; Martin *v.* Railroad Co., 151 U. S. 673, s. c. 14 Supr. Ct. R. 533. A statute attempting to prohibit the right of removal would be unconstitutional. Home Ins. Co. *v.* Morse, 20 Wall. (U. S.) 445; Metropolitan, etc., Co. *v.* Harper, 3 Hughes 260; Commonwealth *v.* East Tenn. Coal Co., (Ky.) 30 S.W. R. 608; Southern Pac. Co. *v.* Denton, 146 U. S. 202, s. c. 13 Supr. Ct. R. 44; Barron *v.* Burnside, 121 U. S. 186, s. c. 7 Supr. Ct. R. 931.

[2] Quigley *v.* Cent. Pac. R. Co., 11 Nev. 350; Mahone *v.* Manchester, etc., R. Co., 111 Mass. 72; Barron *v.* Burnside, 121 U. S. 186.

[3] Railroad Co. *v.* Letson, 2 How. (U. S.) 497; Uphoff *v.* Chicago, etc., R. Co., 5 Fed. R. 545; *post*, § 26.

[4] Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 519; Railroad Co. *v.* Koontz, 104 U. S. 5, 12.

[5] Shaw *v.* Quincy Mining Co., 145 U. S. 444, s. c. 12 Sup. Ct. R. 935, 6 Lewis' Am. R. R. & Corp. R. 357. This decis-

it may, for some purposes, have a legal residence in a state of which it is not a citizen;[1] and under the statutes of most states is held to be a resident of each state and municipality through which the road runs, so as to be entitled to the protection of the local laws,[2] and for purposes of taxation,[3] and of suing and being sued,[4] and for the service of summons.[5] And "a law which requires a foreign corporation to appoint an agent upon whom process may be served, as a condition precedent to its right to transact business within the limits of a state, is valid and binding."[6] For most other purposes railroads are treated as persons having their residence only in the place where their principal office is located.[7] Suits relating to any matters concerning the organization, and conduct of the corporation as such, must generally be brought in the state by which it is chartered, although its principal office may be in another state.[8] And so, as a rule, must all corporate acts done by the

ion sets at rest a vexed question upon which there was much difference of opinion among the circuit judges, and the contrary view taken by Mr. Wood in Wood on Railways., § 14*a*, is not the law.

[1] Thorn *v.* N. Y. Central R. Co., 26 N. J. Law 121; New York, etc., R. Co. *v.* Shepard, 5 McLean (U. S.) 455; Androscoggin, etc., R. Co. *v.* Stevens, 17 Me. 434; Louisville, etc., R. Co. *v.* Letson, 2 How. (U. S.) 497. In Pacific R. Co. *v.* Perkins, 36 Neb. 456, 57 Am. & Eng. R. Cas, 673, it was held that the word "non-resident," in § 100, c. 16, Comp. St., relating to condemnation proceedings for right of way for a railroad, means a non-resident of the state, and not of the locality of the land affected, or of the county where it is situated.

[2] Gloize *v.* South Carolina R. Co., 1 Strobh. (S. C.) L. 70; Richardson *v.* Burlington, etc., R. Co., 8 Iowa 260; People *v.* Fredericks, 48 Barb. (N.Y.) 173.

[3] People *v.* Fredericks, 48 Barb. (N. Y.) 173.

[4] Baldwin *v.* Mississippi, etc., R. Co., 5 Iowa 518.

[5] R. S. Ind. 1881, § 4039; Belden *v.* New York, etc., R. Co., 15 How. Pr. (N. Y.) 17.

[6] Youmans *v.* Minnesota, etc., R. Co., 67 Fed. R. 282, 284; Wilson *v.* Seligman, 144 U. S. 41, 45, s. c. 12 Sup. Ct. R. 541; *Ex parte* Schollenburger, 96 U. S. 369, 374; Reyer *v.* Odd Fellows, etc., Association, 157 Mass. 367, 373, s. c. 32 N. E. R. 469.

[7] Androscoggin, etc., R. Co. *v.* Stevens, 28 Me. 434; Thorn *v.* N. Y. Central R. Co., 26 N. J. L. 121.

[8] Erickson *v.* Nesmith, 4 Allen 233; Williston *v.* Mich. Southern, etc., R. Co., 13 Allen 400; Chase *v.* Vanderbilt, 5 J. & S. (N. Y. Sup.) 334, 62 N. Y. 307; Carey *v.* Cincinnati, etc., R. Co., 5 Iowa 357; Howell *v.* Chicago, etc., R. R. Co., 51 Barb. (N. Y.) 378.

body of the corporation be performed in the domestic jurisdiction, for a corporation can only act in other states by its agents in matters which it may delegate to them.[1]

§ 25. **Federal corporations.** — Corporations formed under authority of the federal government have their domicile within its territorial jurisdiction, and may reside any place within the United States where they have a general office established by authority of law.[2] Congress has power to charter railroad companies in the territories within its jurisdiction.[3] And it seems that a state is powerless to prevent a corporation from doing acts in the discharge of its employment by the federal government,[4] or to exclude one engaged in interstate commerce under authority of the acts of congress.[5]

§ 26. **Railroad in more than one state—Citizenship.**—The legislature of one state may authorize a railroad corporation of another to extend its line into,[6] or hold property in,[7] the territory of the former. Such authority granted to a foreign corporation does not make of it a domestic corporation.[8] But where

[1] See Aspinwall *v.* Ohio, etc., R. Co., 20 Ind. 492, where the company undertook to make a call for unpaid subscriptions at a meeting held outside the state. *Ante*, § 17. But a stockholders' meeting may be held in a foreign jurisdiction, if all the shareholders consent to such meeting, or ratify its action. Stutz *v.* Handley, 7 Ry. & Corp. L. J. 407, 41 Fed. R. 531; Missouri Lead, etc., Co. *v.* Reinhard, 114 Mo. 218, s. c. 35 Am. St. R. 746.

[2] Bank of U. S. *v.* McKenzie, 2 Brock. (U. S. C. C.) 393.

[3] *Ante*, § 15, note.

[4] Stockton *v.* Baltimore, etc., Railroad Co., 32 Fed. R. 9, 14; Pembina Mining Co. *v.* Pennsylvania, 125 U. S. 181, 186; Horn Silver Min. Co. *v.* New York, 143 U. S. 305.

[5] Pensacola Tel. Co. *v.* Western U. Tel. Co., 96 U. S. 1, 12.

[6] Goodlett *v.* Louisville, etc., R. Co., 122 U. S. 391, 7 Sup. Ct. 1254; Baltimore, etc., R. Co. *v.* Harris, 12 Wall. (U. S.) 65; Pomeroy *v.* New York, etc., R. Co., 4 Blatch. (U. S.) 120.

[7] Baltimore & O. R. Co. *v.* Wightman, 29 Gratt. (Va.) 431; Indianapolis, etc., R. Co. *v.* Vance, 96 U. S. 450; Goshorn *v.* Ohio County, 1 W. Va. 308; Baltimore, etc., R. Co. *v.* Noell, 32 Gratt. (Va.) 394; Baltimore, etc., R. Co. *v.* Gallahue, 12 Gratt. (Va.) 655. The authority granted does not confer jurisdiction as to such property on the incorporating state. Eaton & H. R. Co. *v.* Hunt, 20 Ind. 457.

[8] Dennistown *v.* New York, etc., R. Co., 1 Hilton (N.Y.) 62; State *v.* Delaware, etc., R. Co., 30 N. J. L. 473, 31 N. J. L. 531; Erie R. Co. *v.* Stringer, 32 Ohio St. 468; Baltimore, etc., R. Co. *v.* Cary, 28 Ohio St. 208. Nor

a railroad corporation is formed by the concurrent legislation of two or more states,[1] or by the consolidation of corporations of two or more states by authority of their laws,[2] it is a citizen of each, having a domicile[3] therein where its corporate business may be transacted.[4] It is not the same, but a distinct corporation in each state, so far as its property and business within that state are concerned,[5] and is controlled therein by the laws of the state substantially as any other domestic corporation is controlled.[6]

§ 27. **Control of railroads in more than one state.**—The laws of a state can have no effect beyond the limits of its territorial jurisdiction,[7] and such a corporation is not affected, in

does it change the relationship to the incorporating state. Commonwealth *v.* Pittsburg & C. R. Co., 58 Pa. St. 26. But it may be, in a sense, a domestic corporation if the statute so provides in fixing the terms upon which it is authorized to enter and carry on business in the state. Young *v.* South Tredegar, etc., Co., 85 Tenn. 189, s. c. 4 Am. St. R. 752. The same statute construed in the case just cited has, however, been held by the federal court not to make the foreign corporation authorized to do business in Tennessee a domestic corporation of that state. Markwood *v.* Southern Ry. Co., 65 Fed. R. 817. It was, therefore, permitted to remove the cause to the federal court. See, also, Rece *v.* Newport News, etc., Co., 32 W. Va. 164, 3 L. R. A. 572.

[1] Ohio, etc., R. Co. *v.* Wheeler, 1 Black (U. S.) 286; Newport, etc., Co. *v.* Woolley, 78 Ky. 523; Nashua, etc., R. Co. *v.* Boston, etc., R. Co., 136 U. S. 356.

[2] Cohn *v.* Louisville, etc., R. Co., 39 Fed. R. 227; *In re* St. Paul, etc., R. Co., 36 Minn. 85; Guinault *v.* Louisville, etc., R. Co., 41 La. Ann. 571; State, *ex rel.*, *v.* Chicago, etc., R. Co., 25 Neb. 165; Beach on Priv. Corp., § 336.

[3] Guinault *v.* Louisville, etc., R. Co., 41 La. Ann. 571; Covington, etc., Bridge Co. *v.* Mayer, 31 Ohio St. 317.

[4] Graham *v.* Boston, etc., R. Co., 118 U. S. 161; Baltimore, etc., R. Co. *v.* Harris, 12 Wall. (U. S.) 65; Covington, etc., Bridge Co. *v.* Mayer, 31 Ohio St. 317.

[5] Peik *v.* Chicago, etc., R. Co., 94 U. S. 164; Central Trust Co. *v.* St. Louis, etc., Ry. Co., 41 Fed. R. 551; Sprague *v.* Hartford, etc., R. Co., 5 R. I. 233; Atwood *v.* Shenandoah Valley R. R. Co., 85 Va. 966, s. c. 38 Am. & Eng. R. R. Cas. 534, 9 S. E. R. 748; Pittsburgh, etc., R. R. Co. *v.* Rothschild, (Pa.) 26 Am. & Eng. R. R. Cas. 50.

[6] Delaware Railroad Tax Cases, 18 Wall. (U. S.) 206; Clark *v.* Barnard, 108 U. S. 436; Gage *v.* Lake Shore, etc., R. R. Co., 70 N. Y. 220; Ohio, etc., R. Co. *v.* Weber, 96 Ill. 443; Chicago, etc., R. Co. *v.* Auditor-General, 53 Mich. 79.

[7] Newport, etc., Co. *v.* Woolley, 78 Ky. 523; Land Grant Ry. Co. *v.* Comrs. of Coffey Co., 6 Kan. 245; Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 519, 586; County of Allegheny *v.* Cleveland,

regard to its rights, duties, and liabilities, in one sovereignty, by the terms of the charter granted to it by another,[1] but its charter may be amended in either state so as to control its action in that state although the amendment be opposed to the constitution or laws of another state by which it is also chartered.[2] Where it has but one set of shareholders owning shares of a capital stock which represents the entire property, and its entire business and property are under a single management and operated as a unit, contracts made by the controlling power are held to be made by each of the corporations,[3] and a decree rendered against the railroad in one state will bind it in the other.[4] It may be restrained by the courts of one state from using its corporate funds for other than corporate purposes in another through which it runs.[5] But it has been held that a state can not tax bonds of such a railroad corporation, secured by a mortgage on its entire line, for the reason that this would

etc., R. Co., 51 Pa. St. 228; Louisville, etc., R. Co. *v.* Letson, 2 How. (U. S.) 497; Warren *v.* First Nat. Bank, 149 Ill. 9, s. c. 25 L. R. A. 746.

[1] Ohio, etc., R. Co. *v.* Wheeler, 1 Black (U. S.) 286; Muller *v.* Dows, 94 U. S. 444. One state can not impose any restrictions or limitations upon the exercise of corporate powers in another state by a corporation which extends into both jurisdictions. Atwood *v.* Shenandoah Valley R. Co., 85 Va. 966, s. c. 9 S. E. R. 748. But it is held that a corporation which has been adjudged insolvent and placed in the hands of a receiver in the state of its incorporation can not prosecute a writ of error in another state, over the objection of the receiver. American Water-works Co. *v.* Farmers, etc., Co., (Colo.) 25 L. R. A. 338. The court admitted the general rule that laws have no extra-territorial force as mere laws, but said that "things done in one state in pursuance of laws thereof are valid and binding in other states."

[2] City of Covington *v.* Covington, etc., Bridge Co., 10 Bush. (Ky.) 69.

[3] Bissell *v.* Michigan, etc., R. Co., 22 N. Y. 258; Racine, etc., R. Co. *v.* Farmers', etc., Co., 49 Ill. 331.

[4] Paine *v.* Lake Erie, etc., R. Co., 31 Ind. 283, 347.

[5] Baltimore, etc., R. Co. *v.* Glenn, 28 Md. 287, 320; State *v.* Northern C. R. R. Co., 18 Md. 193, 215; Fisk *v.* Chicago, etc., R. Co., 4 Abbott's Pr. N. S. (N. Y.) 378, 53 Barb. 513; March *v.* Eastern R. Co., 40 N. H. 548, 577; Wilmer *v.* Atlanta, etc., R. Co., 2 Woods (U. S.) 409. And it may be enjoined as an entirety in the courts of either state from making unjust discrimination as a common carrier, although some of the acts were performed in the other state. Scofield *v.* Lake Shore, etc., R. Co., 43 Ohio St. 571, s. c. 23 Am. & Eng. R. R. Cas. 612; McDuffee *v.* Portland, etc., R. R. Co., 52 N. H. 430, 447.

be a tax upon property lying without the state.[1] The courts of one state, having jurisdiction of the mortgagor and trustees under a mortgage covering such a road may order the sale of the entire road, subject to liens existing in the other state.[2] But where a corporation which is subject to a mortgage in one state, consolidates with a corporation of another state, the courts of such other state acquire no jurisdiction to enforce a foreclosure of the mortgage.[3] The courts of either state may appoint a receiver for so much of the line as lies within its jurisdiction,[4] and the corporation in one state may be wound up and dissolved without affecting its charter rights in other states.[5] The circuit court of the United States, for a district in one state will exercise jurisdiction to appoint a receiver for an entire line extending into several states.[6] It may be somewhat difficult to reconcile all of these decisions with one another, for in several of them the court evidently looked upon the corporation as one and the same in each state, while in most of them the court treated it as practically a separate corporation in each state. In some of the cases the result would have been the same from either point of view.

§ 28. **Result of consolidation or concurrent action of several states creating new corporations.**—It is said that the fiction that makes two or three corporations out of what is in fact one, is established for the purpose of giving each state its legitimate control over the charters which it grants; but the acts and neglects of the corporation are those of it as a whole.[7] There

[1] Northern Cent. Ry. Co. *v.* Jackson, 7 Wall. (U. S.) 262. See, also, Wood *v.* Goodwin, 49 Me. 260.

[2] Muller *v.* Dows, 94 U. S. 444; McElrath *v.* Pittsburg, etc., R. Co., 55 Pa. St. 189; Mead *v.* New York, etc., R. Co., 45 Conn. 199; Hand *v.* Savannah, etc., R. Co., 12 S. C. 314, 366.

[3] Eaton, etc., R. Co. *v.* Hunt, 20 Ind. 457.

[4] Ellis *v.* Boston, etc., R. Co. 107 Mass. 1; *In re* United States Rolling-stock Co., 55 How. Pr. 286, 57 How. Pr. 16; Richardson *v.* Vermont, etc., R. Co., 44 Vt. 613.

[5] Hart *v.* Boston, etc., R. Co., 40 Conn. 524.

[6] Wilmer *v.* Atlanta, etc., R. Co., 2 Woods (U. S.) 409; Brassey *v.* New York, etc., R. Co., 19 Fed. R. 663; Mercantile Trust Co. *v.* Missouri, etc., R. Co., 36 Fed. R. 221.

[7] Horne *v.* Boston, etc., R. Co., 18 Fed. R. 50.

is conflict among the authorities as to whether the result of a consolidation or incorporation under the laws of two or more states is one corporation or several corporations with a common name, stock, stockholders and property. But, as already stated, they are substantially in accord upon the proposition that for certain purposes, practically at least, two or more corporations are thus created. In other words, the portion of a railroad in either state is subject, in the main, to the laws of that state just as if it were a separate corporation of such state. Upon the general subject, however, it is said on the one hand, that the legislatures of two different states can not co-operate and unite in creating a single corporation so as to make it one and the same legal being in both,[1] and that, if a corporation be regarded as a legal institution or group of laws manifested in legal relations, as such laws can have no extra territorial force, they must constitute a single, complete and separate corporation in each state.[2] On the other hand, it is said that there is no reason why several states can not unite in creating one and the same corporation having a common name, stock, stockholders and property,[3] which will be, in reality, a single corporation, although it may be clothed with the powers of two corporations.[4] Thus, it has been held that such a corporation may legally hold shareholders' meetings in either state which will be valid as to all the property and stockholders in both.[5] Another court has said that "a corporation may have a two-fold organization, and be, so far as its relation to our state is concerned, both foreign and domestic. It may have a corporate entity in each state, yet its general character be of a bi-

[1] Ohio and Mississippi R. R. Co. *v.* Wheeler, 1 Black (U. S.) 286; Racine, etc., R. R. Co. *v.* Farmers', etc., Co., 49 Ill. 331; Alleghany County *v.* Cleveland, etc., R. R. Co., 51 Pa. St. 228; Newport, etc., Bridge Co. *v.* Woolley, 78 Ky. 523.

[2] Taylor's Priv. Corp., § 404, *et seq.*

[3] See Railroad Co. *v.* Harris, 12 Wall. (U. S.) 65; Graham *v.* Boston, etc., R. R. Co., 118 U. S. 161. Mr. Pierce strongly advocates this doctrine. Pierce on Railroads, 17, 19.

[4] Covington Bridge Co. *v.* Mayer, 31 Ohio St. 317.

[5] Covington Bridge Co. *v.* Mayer, 31 Ohio St. 317; Graham *v.* Boston, etc., R. R. Co., 14 Fed. R. 753, on appeal, 118 U. S. 161. See, also, Ohio & M. Ry. Co., *v.* People, 123 Ill. 467; Guinault *v.* Louisville, etc., R. R. Co., 41 La. Ann. 571.

fold organization.'"[1] It is also said that when "two corporations created in different states consolidate, though for most purposes they are not therefore to be separately regarded, yet in each state the consolidated company is deemed to stand in the place of the corporation to which it there succeeded, and of its members, and consequently to be a citizen of that state for many purposes, while in the other state it would stand in the place of the other corporation in respect to citizenship there.'"[2] Perhaps the question is to some extent to be determined by the legislative intention, for, if it be conceded that two states can co-operate so as to create one and the same corporation, as it certainly must be, in a sense, at least, it must also be conceded that each may authorize the same persons to incorporate a distinct company in that state, for the same general business, to hold property and operate in that state in connection with the company in the other state.[3] The question most often arises with respect to the jurisdiction of the federal courts, but it seems that such jurisdiction does not necessarily depend altogether upon the answer to the question, for, whether there be one or two corporations, it is generally held, as we have already shown, that there is a domestic corporation or citizen of each state by which a charter is granted.[4] But this ruling seems to be more consistent with the theory that there are two corporations. And this is the view that appears to have been taken by the Supreme Court of the United States in a recent decision, which, however, it may be somewhat difficult to reconcile with other decisions and *dicta* of that court, and which resulted in the corporation created in the first state being held to be a foreign rather than a domestic corporation of the sec-

[1] McGregor *v.* Erie Ry. Co., 35 N. J. L. 115, 118.

[2] Chicago & N. W. Ry. Co. *v.* Auditor-General, 53 Mich. 79, 92, per Cooley, C. J.

[3] Clark *v.* Barnard, 108 U. S. 436. *Ante*, § 26. And may authorize a consolidation, so-called, at least, by keeping one of the corporations alive and permitting it to absorb or merge the other. See *post*, chapter on Consolidation.

[4] Phinizy *v.* Augusta, etc., R. R. Co., 56 Fed. R. 273; Muller *v.* Dows, 94 U. S. 444; Memphis & C. R. R. Co. *v.* Alabama, 107 U. S. 581, s. c. 2 Sup. Ct. R. 432; Railway Co. *v.* Whitton, 13 Wall. (U. S.) 270; State *v.* Chicago, etc., R. R. Co., 25 Neb. 156, 2 L. R. A. 564, and note.

ond state. In the case to which we refer it appeared that the Nashua and Lowell Railroad Corporation was first created by the legislature of New Hampshire in 1835. In 1836 the legislature of Massachusetts constituted the same persons a corporation of that state, under the same name, and authorized them to build their road from Nashua, New Hampshire, to Lowell, Massachusetts. In 1838 both states passed laws constituting the stockholders of each corporation stockholders in the other, and uniting them into one corporation under the old name, and providing that all the "tolls, franchises, rights, powers, privileges and property of the two should be held and enjoyed by all the stockholders in proportion to the number of their shares in either or both of said corporations." In 1857, the Nashua and Lowell Railroad Corporation entered into a traffic agreement with the Boston and Lowell Railroad Corporation, which was incorporated under the laws of Massachusetts. A controversy afterwards arose over this, and the former, alleging that it was a New Hampshire corporation, brought suit against the latter in the United States circuit court of Massachusetts. It was held that the plaintiff "must be considered simply in its character as a corporation created by the laws of New Hampshire, and, as such, a citizen of that state, and so entitled to go into the circuit court of the United States and bring its bill against a citizen of any other state, and that its union or consolidation with another corporation of the same name, organized under the laws of Massachusetts, did not extinguish or modify its character as a citizen of New Hampshire."[1] The court, as an additional reason for this opinion, called attention to the injustice that would result if the defendant, as a citizen of Massachusetts, could sue the

[1] Nashua and Lowell R. R. Corp. *v.* Boston & L. R. R. Corp., 136 U. S. 356, s. c. 10 Sup. Ct. R. 1004. Citing Farnum *v.* Blackstone Canal Corp. 1 Sum (U. S.) 46; Muller *v.* Dows, 94 U. S. 444; St. Louis, A. & T. H. R. R. Co. *v.* Indianapolis, etc., R. Co., 9 Biss. (U. S.) 144, s. c. on appeal *sub nom.*, Penna. Ry. Co. *v.* St. Louis, etc., R. R. Co., 118 U. S. 290; Racine, etc., R. R. Co. *v.* Farmers' L. & T. Co., 49 Ill. 331; Quincy, etc., Bridge Co. *v.* Adams Co., 88 Ill. 615. See, also, Western & A. R. R. Co. *v.* Roberson, 61 Fed. R. 592; Rece *v.* Newport News, etc., Co., 32 W. Va. 164, 3 L. R. A. 572. Co., 32 W. Va. 164, 3 L. R. A. 572; Louisville T. Co. *v.* Louisville, etc., R. Co., 75 Fed. R. 433.

plaintiff, as a citizen of New Hampshire, in the federal court of New Hampshire, and yet prevent the plaintiff from suing it in Massachusetts on the ground that they were both citizens of the latter state. Another interesting case upon the same general subject was recently decided by the supreme court of Massachusetts. An action was brought in Massachusetts by the administrator of a man who had lived there but had been killed by the defendant in Connecticut. The defendant was incorporated in both states, and there was a statute in Massachusetts providing that a cause of action for the death of a person shall survive in his personal representative, but no such law in Connecticut. The court held that the fact that a railroad is operated as a continuous line under a charter from each of two different states does not make its liabilities different or greater in one of them on account of an accident occurring in the other, nor because the person injured was a resident of the former, and that, as the statute of Connecticut gave no right of action, the plaintiff could not recover in Massachusetts.[1]

§ 29. **Railroad only a citizen or domestic corporation of states that charter it—Effect of mere license.**—Many railroad corporations operate lines in other states than those by which the corporations are created, under license only, in which case they remain domestic corporations and citizens only of the states by which their charters are granted, and foreign corporations in the states granting the license.[2] An act of the legislature recognizing a foreign corporation, or granting it privileges, will not be construed to be a charter of incorporation, unless there be a manifest intention to create a new corporation within the state.[3] And the fact that the title of an act denominates it "an act to incorporate," is not sufficient to show such intention, where

[1] Davis *v.* New York, etc. R. R., 143 Mass. 301, s. c. 58 Am. R. 138.

[2] Goodlett *v.* Louisville, etc., R. Co., 122 U. S. 391; Railroad Co. *v.* Harris, 12 Wall. (U. S.) 65, 83; Pennsylvania Co. *v.* St. Louis, etc., R. Co., 118 U. S. 290; Martin *v.* Baltimore, etc., R. R. Co., 151 U. S. 673, s. c. 14 Sup. Ct. R. 533.

[3] Memphis, etc., R. Co. *v.* Commissioners, 112 U. S. 609; New Orleans, etc., R. Co. *v.* Delamore, 114 U. S. 508; Martin *v.* Baltimore, etc., R. R. Co., 151 U. S. 673, s. c. 14 Sup. Ct. R. 533.

the body of the act is more properly construed as a license.[1] A railroad company operating a line in a foreign jurisdiction under a lease,[2] or under authority given to it to condemn land for a right of way, and to build and operate a railroad,[3] does not thereby become a domestic corporation, even where the act giving it authority contains a proviso that it shall be deemed a domestic corporation as to all causes of action arising within the state.[4] Where a corporation is doing business under a license, the license may generally be revoked at the pleasure of the state granting it;[5] but this rule would probably be subject, as to railroads, to the principle that a state can not exclude a corporation engaged in interstate commerce.[6]

§ 30. **Foreign corporation—Conditions of admission to state.** —The provision of the fourteenth amendment of the federal constitution, declaring that no state shall "deny to any person within its jurisdiction the equal protection of the laws," does not prohibit a state from imposing conditions upon foreign corporations before admitting them and allowing them to do business within the state.[7] But the conditions must not be such as

[1] Goodlett *v.* Louisville, etc., R. Co., 122 U. S. 391.

[2] Baltimore, etc., R. Co. *v.* Koontz, 104 U. S. 5; Baltimore, etc., R. Co. *v.* Cary, 28 Ohio St. 208; Callahan *v.* Louisville, etc., R. R. Co., 11 Fed. R. 536. So, where it purchases the local road. Morgan *v.* East Tenn., etc., R. R. Co., 48 Fed. R. 705; Conn *v.* Chicago, etc., R. R. Co., 48 Fed. R. 177. Unless it is merged or consolidated with it. Augier *v.* East Tenn., etc., R. R. Co., 74 Ga. 634, s. c. 20 Am. & Eng. R. R. Cas. 618; Schaefer *v.* East Tenn., etc., R. R. Co., 76 Ga. 99.

[3] Hand *v.* Savannah, etc., R. Co., 12 S. C. 314. "A corporation of Illinois, authorized by its laws to build a railroad across the state from the Mississippi river to its eastern boundary, may, by the permission of the state of Indiana, extend its road a few miles within the limits of the latter, or, indeed, through the entire state, and may use and operate the line as one road, by the permission of the state, without thereby becoming a corporation or a citizen of the state of Indiana." Pennsylvania Co. *v.* St. Louis, etc., Co. 118 U. S. 290.

[4] Chicago, etc., R. Co. *v.* Becker, 32 Fed. R. 849. But see Western & A. R. R. Co. *v.* Roberson, 61 Fed. R. 592.

[5] Woods Ry. Law, § 15 and cases cited; Doyle *v.* Continental Ins. Co., 94 U. S. 535; Hartford Ins. Co. *v.* Raymond, 70 Mich. 485.

[6] Pensacola Tel. Co. *v.* Western Union Tel. Co., 96 U. S. 1; Norfolk, etc., R. Co. *v.* Pennsylvania, 136 U. S. 114. See also 41 Cent. L. J. 152.

[7] Norfolk, etc., R. Co. *v.* Pennsylvania, 136 U. S. 114, s. c. 10 Sup. Ct. R. 958; Milnor *v.* New York, etc., R. R.

tax interstate commerce,[1] or invade the province of Congress. Many of the states have laws prescribing the conditions upon which such corporations will be permitted to do business.[2] Several of them prohibit any foreign railroad corporation from acquiring a right of way and doing business without procuring a charter and becoming a domestic corporation.[3] Bringing an action in the state or federal courts of a foreign state does not constitute "doing business" in such state, and such an action may be maintained, although the laws of that state relating to foreign corporations within its limits have not been complied

Co., 53 N. Y. 363; People *v.* Fire Ass'n, 92 N. Y. 311, s. c. 44 Am. R. 380. A statute imposing as a condition upon foreign corporations doing business in Pennsylvania that they shall assess and collect the tax upon that portion of their loans in the hands of individual residents within the state was held valid, as such statute does not impose a tax, but simply defines a duty, and fixes a penalty for a disregard thereof. Com. *v.* New York, L. E. & W. R. Co., 129 Pa. 463, 25 W. N. C. 15; New York, etc., R. R. Co. *v.* Com., 7 R. R. & Corp. L. J. 14, 18 Atl. 412. But this was reversed in N. Y., L., E. & W. R. R. Co. *v.* Penna., 153 U. S. 628, s. c. 14 Sup. Ct. R. 952, for the reason that the statute impaired the obligation of the contract between the company and the state. See note to State *v.* Ackerman, (Ohio) 24 L. R. A. 298, and note to Cone, etc., Co. *v.* Poole, (S. Car.) 24 L. R. A. 289; "State Legislation Against Foreign Corporations," 41 Cent. L. Jour. 152.

[1] Crutcher *v.* Commonwealth, 141 U. S. 47, s. c. 11 Sup. Ct. R. 851; Norfolk, etc., R. R. Co. *v.* Pennsylvania, 136 U. S. 114, s. c. 10 Sup. Ct. R. 958; McCall *v.* People, 136 U. S. 104, s. c. 10 Sup. Ct. R. 881.

[2] See Stimson's Am. Stat. (1892) § 8400–8415.

[3] See, for instance, Pub. Acts, Va., 1889-90, c. 67, p. 51. So, in Nebraska, it is held that a foreign railroad corporation, being prohibited by the constitution from acquiring a right of way in Nebraska, can not do so indirectly through a Nebraska corporation. Koenig *v.* Chicago, B. & Q. R. Co., 27 Neb. 699, 43 N. W. 423. In Pennsylvania, where the statutes allow the stock of domestic corporations to be held by other corporations, it is held that a foreign corporation does not, by owning all the stock of a domestic corporation, "acquire or hold" the real estate of the domestic corporation so as to violate the act of April 26, 1855, against acquiring or holding real estate "directly in the corporate name, or by, or through any trustee or other device whatsoever, unless specially authorized," under penalty of escheat. Com. *ex rel.* Attorney-General *v.* New York, L. E. & W. R. Co., (Pa.) 7 L. R. A. 634, 25 W. N. C. 404, 47 Leg. Int. 222, 19 Atl. 291, 132 Pa. St. 591. A constitutional provision that no foreign corporation shall "have power to condemn or appropriate property" does not prevent a foreign railroad corporation from acquiring a right of way by agreement with the land owner. St. Louis, etc., R. Co. *v.* Foltz, 52 Fed. R. 627.

with.[1] Where a foreign corporation doing business in the state fails to designate a resident agent, upon whom service of process may be made as required by law, it has been held that a court possessing equity powers has jurisdiction to appoint a receiver for the business of such corporation, without personal service, upon a showing of an immediate necessity for such action.[2]

§ 31. **Railroads as property.**—All property essential to the operation of a railroad, including the right of way, road-bed, ties, rails, side-tracks, switches, depots, station-houses, water-tanks, and other fixtures, together with the rolling stock and other necessary movable appliances, has been held by the federal courts to be real estate.[3] The same ruling is made by the courts of many states,[4] in some of which the character of rolling stock as property is fixed by statute.[5]

[1] Texas Land, etc., Co. *v.* Worsham, 76 Tex. 556; Christian *v.* American, etc., Co., 89 Ala. 198, 7 So. R. 427; American Loan, etc., Co. *v.* East & W. R. Co., 37 Fed. R. 242; Powder River, etc., Co. *v.* Custer County, 9 Mont. 145, 22 Pac. 383; C. B. Rogers & Co., *v.* Simmons, 155 Mass. 259; Ayres *v.* Siebel, 82 Iowa 347.

[2] Glines *v.* Supreme S. O. of I. H., 20 N. Y. Supp. 275.

[3] Minnesota Co. *v.* St. Paul Co., 2 Wall. (U. S.) 609; Farmers' Loan and Trust Co. *v.* St. Jo., etc., Railroad Co., 3 Dill. (U. S.) 412; Pennock *v.* Coe, 23 How. (U. S.) 117. This ruling is made the more readily when necessary to the protection of the rights of lien holders, in whose hands the permanent structure without the movable appliances would have little value. An analogy is drawn between rolling stock and other movable railroad appliances, and venetian blinds, lightning rods, cattle, and slaves, and implements used in working a plantation, a steelyard in a machine house, fish in a pond, doves in a cote, all of which have been held to be realty. Farrar *v.* Stackpole, 6 Greenl. 155; Lushington *v.* Sewell, 1 Sim. 435, 480; Washburn on real Property, (3d ed.) vol. 1, page 10. But see as to taxation, the more recent decisions of the Supreme Court of the United States in Green *v.* Van Buskirk, 7 Wall. 139, 150; Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, s. c. 13 Am. & Eng. Corp. Cas. 365; also Baltimore, etc., R. R. Co. *v.* Allen, 22 Fed. R. 376, s. c. 17 Am. & Eng. R. R. Cas. 461.

[4] Farmers' Loan and Trust Co. *v.* Hendrickson, 25 Barb. (N.Y.) 484, 493; Palmer *v.* Forbes, 23 Ill. 237; Youngman *v.* Elmira, etc., R. Co., 65 Penn. St. 278; Louisville, etc., R. R. Co. *v.* State, 25 Ind. 177; Tiedeman on Real Property, § 2; and authorities cited in 19 Am. & Eng. Ency. of Law, 882, 883, where it is said that the better and more recent authorities, which are there cited, hold that it is personalty.

[5] Phillips *v.* Winslow, 18 B. Mon. (Ky.) 431; Miller *v.* Rutland, etc., R. Co., 36 Vt. 452, 490.

In those states in which the subject is uncontrolled by statute, the preponderance of authority is to the effect that only the land owned by the railroad company, together with the ties, rails and other structures permanently affixed thereto, is realty; and that engines, cars, and other movable appliances are to be regarded for most purposes as personalty.[1] The question of what is permanently affixed to a railroad right of way is one partly of law and partly of fact, mainly dependent on the purpose of the builders, whether, for example, it be to construct a main line or side branches for temporary use.[2] A railroad corporation's property, so far as the ownership and the profit are concerned, is to all intents and purposes private, though applied to a use in which the public has an interest.[3]

§ 32. **Railroads as monopolies.**—A railroad is not necessarily nor usually a monopoly in a legal sense, nor is the company entitled to prevent the location of a rival railroad upon or across the territory through which its road runs, when such rival road is duly authorized by the state;[4] for the grant of a franchise to one corporation will not be construed as a pledge that the state will not grant similar franchises to another, although by so doing it may impair or even destroy the value of the first franchise.[5] The legislature may, however, unless

[1] Rorer on Railroads, §§ 10, 11; Green's Brice's Ultra Vires, 238 and note; Hoyle *v.* Plattsburg, etc., R. R. Co., 54 N. Y. 314, s. c. 13 Am. R. 595; Randall *v.* Elwell, 52 N. Y. 521, s. c. 11 Am. R. 747; Williamson, Trustee, *v.* New Jersey Southern R. Co., 29 N. J. Eq. 311, 15 Am. R. Rep. 572, and authorities there cited; Chicago, etc., R. R. Co. *v.* Ft. Howard, 21 Wis. 44; Boston, etc., R. R. Co. *v.* Gilmore, 37 N. H. 410; Coe *v.* Columbus, etc., R. R. Co., 10 Ohio St. 372, s. c. 75 Am. Dec. 518; and authorities cited in 25 Am. & Eng. Ency. of Law, 654.

[2] Van Keuren *v.* Central R. of N. J., 38 N. J. L. 165, 13 Am. R. Rep. 43.

[3] Lake Shore, etc., R. Co. *v.* Chicago, etc., R. Co., 97 Ill. 506; Pittsburg, etc., R. Co. *v.* Benwood Iron Works, 31 W. Va. 710, 36 Am. & Eng. R. Cas. 531.

[4] Baltimore, etc., R. Co. *v.* State, 45 Md. 596; Newcastle, etc., R. Co. *v.* Peru, etc., R. Co., 3 Ind. 464; Metropolitan R. Co. *v.* Highland St. R. Co., 118 Mass. 290; 1 Rorer on Railroads, 9; Pierce on Railroads, 452, 453. But see Raritan, etc., R. Co. *v.* Delaware, etc., Canal Co., 18 N. J. Eq. 546.

[5] Charles River Bridge *v.* Warren Bridge, 6 Pick. (Mass.) 376, 7 Pick. (Mass.) 344, 11 Peters (U. S.) 420. See, also, as to turnpikes, Indian C. R. Co. *v.* Robinson, 13 Cal. 519; Bartram *v.* Central T. Co., 25 Cal. 283;

prohibited by the constitution, grant an exclusive franchise to build and maintain a railroad within certain limits,[1] such franchise being always subject to the right of eminent domain.[2] But a monopoly is not to be implied.[3]

Collins *v.* Sherman, 31 Miss. 679; Turnpike Co. *v.* State, 3 Wall. (U. S.) 210; Washington & B. T. R. *v.* Baltimore & O. R. Co., 10 Gill & J. 392; White R. T. Co. *v.* Vermont C. R. Co., 21 Vt. 590; Lafayette P. R. Co. *v.* New Albany & S. R. Co., 13 Ind. 90. As to bridges, see Hamilton Ave., *In re*, 14 Barb. 405; Fall *v.* Sutter C., 21 Cal. 237; Oswego Falls B. Co. *v.* Fish, 1 Barb. Ch. 547; Hartford B. Co. *v.* Union Ferry Co., 29 Conn. 210; Thompson *v.* New York & H. R. Co., 3 Sandf. Ch. 625. As to ferries, see Collins *v.* Sherman, 31 Miss. 679; Fitch *v.* New Haven, N. L. & S. R. Co., 30 Conn. 38; Wright *v.* Nagle, 101 U. S. 791; Richmond & L. T. R. Co. *v.* Rogers, 1 Duvall 135; McLeod *v.* Burroughs, 9 Ga. 213; Harrison *v.* Young, 9 Ga. 359; Shorter *v.* Smith, 9 Ga. 517. As to canals, see Tuckahoe C. Co. *v* Tuckahoe, etc., R. Co., 11 Leigh 42; Illinois & M. C. Co. *v.* Chicago & R. I. R. Co., 14 Ill. 314.

[1] Boston, etc., R. Co. *v.* Salem, etc., R. Co., 2 Gray (Mass.) 1; Pennsylvania R. Co. *v.* National, etc., R. Co., 23 N. J. Eq. 441; State *v.* Noyes, 47 Me. 189, 208; Pennsylvania R. Co. *v.* Baltimore, etc., R. Co., 60 Md. 263; Camblos *v.* Phila., etc., R. Co., 4 Brewster (Pa.) 563, 595; 19 Am. & Eng. Encyl. of L. 784; Pierce on Railroads, 454, citing Micou *v.* Tallassee C. Co., 47 Ala. 652; Binghampton B. Co., *In re*, 3 Wall. (U. S.) 51; Chenango B. Co. *v.* Binghamton B. Co., 27 N. Y. 87; Chenango B. Co. *v.* Lewis, 63 Barb. 111; Bridge Proprietors *v.* Hoboken Co., 1 Wall. 116, 13 N. J. Eq. 81, 503; Martin *v.* O'Brien, 34 Miss. 21; California State Tel. Co. *v.* Alta T. Co., 22 Cal. 398; Richmond, etc., R. Co. *v.* Louisa R. Co., 13 How. 71; Pontchartrain R. Co. *v.* Orleans Nav. Co., 15 La. 404; Delaware & R. C. Co. *v.* Camden & A. R. Co., 16 N. J. Eq. 321, 18 N. J. Eq. 546; Michigan C. R. Co. *v.* Michigan S. R. Co., 4 Mich. 361; Penna. R. Co. *v.* National R. Co., 23 N. J. Eq. 441. In Fidelity Trust & Safety Vault Co. *v.* Mobile St. R. Co., 53 Fed. R. 687, it is held that one public corporation can not take the franchise of another even under legislative authority, if such taking will materially affect its use. Where there is no reserved right of amendment, the grant of an exclusive franchise to operate a railroad within

[2] Enfield T. B. Co. *v.* Hartford & N. H. R. Co., 17 Conn. 40, 454; Piscataqua B. *v.* New Hampshire Bridge, 7 N. H. 35; New Orleans, etc., R. Co. *v.* Southern & A. T. Co., 53 Ala. 211; New Jersey S. R. Co. *v.* Long Branch Com., 39 N. J. L. 28; Metropolitan C. R. Co. *v.* Chicago W. D. R. Co., 87 Ill. 317.

[3] Charles River Bridge *v.* Warren Bridge, 11 Peters (U. S.) 420; State, *ex rel.* Attorney-General, *v.* Hamilton, 47 Ohio St. 52, 29 Am. & Eng. Corp. Cas. 208, 23 W. L. Bull. 190, 23 N. E. 935; Syracuse Water Co. *v.* Syracuse, 5 L. R. A. 546, 116 N. Y. 167, 29 Am. & Eng. Corp. Cas. 307, 26 N. Y. S. R. 364, 22 N. E. 381; Hudson River Teleph. Co. *v.* Watervliet Turnp. & R. Co., 56 Hun 67, 29 N. Y. S. R. 694, 9 N.Y. Supp. 177; Lafayette Plank Road Co. *v.* New Albany, etc., R. R. Co., 13 Ind. 90. *Post*, § 39.

§ 33. **Railroads as public highways.**—Railroads, by whomsoever constructed or owned, are *quasi* public works and are often likened to public highways.[1] The constitutions[2] and laws[3] of some states declare them to be public highways; those of others declare the companies to be common carriers, whose roads are available to all persons for the transportation of themselves and their property.[4] This latter definition expresses most nearly the relation of a completed railroad to the public. Except in discharging its duties as a carrier, the company is

certain limits amounts to a contract on the part of the state, which it can not violate by the conferring upon another company power to build and operate a parallel road. Boston, etc., R. Co. *v.* Salem, etc., R. Co., 68 Mass. (2 Gray) 1; Pennsylvania R. Co. *v.* Baltimore, etc., R. Co., 60 Md. 263. See, also, Raritan, etc., R. R. *v.* Canal Co., 18 N. J. Eq. 546; Pontchartrain R. R. Co. *v.* New Orleans, etc., R. R. Co., 11 La. Ann. 253. But compare Boston, etc., R. R. Co. *v.* Boston, etc., R. R. Co., 5 Cush. (Mass.) 375; Richmond, etc., R. R. Co. *v.* Louisa, etc., R. R. Co., 13 How. (U. S.) 71; Louisville, etc., R. R. Co. *v.* Louisville City R. R. Co., 2 Duv. (Ky.) 175.

[1] White River T. Co. *v.* Vermont C. R. Co., 21 Vt. 590. "We regard it as a misnomer to attach even the name '*quasi* public corporation' to a railroad company. * * * Its road may be called a *quasi* public highway." Gordon, J., in Peirce *v.* Com., 104 Pa. St. 150, 13 Am. & Eng. R. Cas. 74, 79. LakeSuperior, etc., R. Co. *v.* U. S., 93 U. S. 442, 458, dissenting opinion. "That railroads, though constructed by private corporations and owned by them, are public highways, has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have had any existence." Olcott *v.* Supervisors, 16 Wall. (U. S.) 678, 694. But the old theory that a railroad is a public highway in the same sense as a turnpike, over which any person may run his vehicles upon payment of suitable tolls, has been abandoned. Cook on Stock and Stockholders, (3d ed.) § 900, citing Beekman *v.* Saratoga, etc., R. Co., 3 Paige (N. Y.) 45, 74; Camblos *v.* Philadelphia, etc., R. Co., 4 Brewster (Pa.) 563, 597. They are not highways in such a sense as to render an obstruction thereon a public nuisance. Stoneback *v.* Thomas Iron Co., (Pa.) 4 Atl. R. 721.

[2] Const. Pa., art. 17, § 1; Ill., art. 11, § 12; Neb., 1875, art. 2, § 4; W. Va., art. 11, § 9; Mo., art. 12, § 13; Ark., art. 17, § 1; Tex., art. 10, §§ 1, 2; Cal., art. 12, § 17; Colo., art. 15, § 4; Ala., art. 13, § 21; La., 1879, art. 244; Miss. 1890, art. 6, § 184; Charter Pennsylvania R. Co., 1846, see Trunick *v.* Smith, 63 Pa. St. 18.

[3] Stimson's Am. Stat. Law, §§ 8801, 8830.

[4] The Pennsylvania railroad is declared by its charter (Pamphlet Laws, 1846, 323) to be a public highway, over which the company must haul the cars of all persons who require such service subject to restrictions. Trunick *v.* Smith, 63 Pa. St. 18.

entitled to the exclusive use and possession of its property.[1] There may also be said to be a resemblance to public highways in that the power of eminent domain can be invoked to aid in the construction and extension of railroads,[2] whenever, in the judgment of the legislature, they will be of value as thoroughfares over which the services of common carriers can be rendered.[3] Again, they are so far public improvements that the state may levy and collect a tax to aid in their construction.[4]

[1] Central R. of Georgia *v.* Brinson, 10 Ga. 207, 19 Am. & Eng. R. Cas. 42; Baltimore, etc., R. Co. *v.* Schwindling, 101 Pa. St. 258, 8 Am. & Eng. R. Cas. 544; T. P. & W. R. Co. *v.* Pence, 63 Ill. 524; Hoyt *v.* C. B. & Q. R. Co., 93 Ill. 601; Chicago, etc., Railway Co. *v.* Chicago City Railway Co., 10 Nat. Corp. Rep. 651.

[2] *In re* Niagara Falls, etc., R. R. Co., 108 N. Y. 375; Inhabitants of Worcester *v.* The Western R. Co., 4 Met. (Mass.) 564, 1 Am. Ry. Cas. 350, 352; Hodgerson *v.* St. Louis, etc., R. R. Co., (Ill.) 43 N. E. R. 614; Gibson *v.* Mason, 5 Nev. 283; Stewart *v.* Erie & W. Trans. Co., 17 Minn. 372; Olcott *v.* The Supervisors, 16 Wall. (U. S.) 678; Cooley's Const. Lim. (4th ed.) 665.

[3] Weir *v.* St. Paul, etc., R. Co., 18 Minn. 155; Newburyport T. Co., *v.* Eastern R. Co., 23 Pick. 326, 1 Am. Ry. Cas. 294; Contra Costa R. Co. *v.* Moss, 23 Cal. 323.

[4] Olcott *v.* Supervisors, 16 Wall. (U. S.) 678, *ante*, § 1; *post*, chapter on Municipal Aid; Ravenswood R. Co. *v.* Ravenswood, (W. Va.) 24 S. E. R. 597.

CHAPTER IV.

CHARTERS.

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§ 34. Special charters and general laws.—The power to grant railroad charters in common with charters of other corporations is a legislative function, usually exercised in this

country by the legislatures of the various states,[1] although congress may, in the exercise of its power to regulate interstate commerce, construct, or authorize individuals or corporations to construct, railroads across the states and territories of the United States.[2] These charters are either special, in which case corporate powers are conferred upon certain designated persons by an act of the legislature, in which the powers, duties and liabilities of the specified corporation are enumerated at length; or they are derived from a general authorization to any man or men to be and act as a body corporate upon complying with certain terms.[3] In order to prevent the granting of special and exclusive privileges, and to render all corporations amenable to the will of the legislature at all times, charters are usually conferred only by general laws,[4] special charters being prohibited by the constitutions of most of the states.[5]

§ 35. **Acceptance of charter.**—In either case the charter is generally of no effect until the terms upon which it is granted are complied with, and it is accepted by the incorporators.[6] The construction and operation by a railroad company of a part of its road is sufficient evidence of an acceptance of its charter, where no particular mode of acceptance is designated,[7]

[1] Angell & Ames on Corporations, § 71.

[2] California *v.* Central Pac. R. Co., 2 Interstate Com. R. 153, 127 U. S.1, 8 Sup. Ct. R. 1073; Thomson *v.* Pac. R. R. Co., 9 Wall. (U. S.) 579.

[3] The general law and the articles of incorporation or association executed and filed in compliance therewith, in such a case, constitute the charter.

[4] Morawetz on Private Corp. (2d ed.) § 12; Pierce on railroads, 3.

[5] Stimson Am. St. Law, § 441. Even when the constitution prohibits the creation of corporations by special laws, a special charter granted before the adoption of the constitution may be amended by special act. State *v.* Cape Girardeau Railroad Co., 48 Mo. 468; Roosa *v.* St. Joseph, etc., R. Co., 114 Mo. 508. In support of the text, see Roberts *v.* Missouri, etc., R. Co., 43 Kan. 102, 43 Am. & Eng. R. Cas. 532, 22 Pac. 1006; San Francisco *v.* Spring Valley W. W., 48 Cal. 493; Wallace *v.* Loomis, 97 U. S. 146; St. Paul Fire Ins. Co. *v.* Allis, 24 Minn. 75. In England general power to organize railroads is given by the Railways Construction Facilities Act, 27 and 28 Vict. Ch. 121.

[6] Angell and Ames on Corporations, § 81; Bates *v.* Wilson, 14 Colo. 140; 8 R. R. & Corp. L. J. 144; 24 Pac. R. 99; *ante*, Chapter II.

[7] St. Joseph & I. R. Co. *v.* Shambaugh, 17 S. W. R. 581, s. c. 106 Mo. 557.

and it is held that a railroad charter may be considered as presumptively accepted at its date without record evidence of the fact, when it appears that the grantees afterwards asked for and obtained amendments and have fully constructed the road,[1] although it has been said that the certificate of incorporation constitutes the only evidence of the acceptance of the terms and conditions contained in the statute.[2] This, however, is not the rule with regard to special charters, and it may be doubted if it is of universal application even in other cases.[3]

§ 36. **Terms upon which charter is granted must be complied with—Provisions in general laws.**—It is generally essential to the existence of a *de jure* corporation that the terms upon which a grant of corporate rights is made should be substantially complied with, though slight irregularities will not necessarily defeat the incorporation,[4] particularly where the statute provides for their amendment.[5] The general laws for the incorporation of railway companies in the various states of this country are substantially the same in most respects.[6] They usually require that the articles shall state the name of the company,[7] the amount of the capital stock, and the number of

[1] Farnsworth *v.* Lime Rock R. Co., 83 Me. 440, s. c. 22 Atl. R. 373.

[2] Bates *v.* Wilson, 14 Colo. 140, 8 R. R. & Corp. L. J. 144, 24 Pac. R. 99.

[3] See *ante*, §§ 17, 18, where the subject is more fully treated.

[4] People *v.* Montecito, etc., Co., 97 Cal. 276, s. c. 33 Am. St. R. 172, and note; Eakright *v.* Logansport, etc., R. R. Co., 13 Ind. 404; Busenback *v.* Attica, etc., R. Co., 43 Ind. 265; State *v.* Wood, 84 Mo. 378; People *v.* Cheeseman, 7 Colo. 376; Buffalo, etc., R. Co., *v.* Cary, 26 N. Y. 75; Cayuga Lake R. Co. *v.* Kyle, 64 N. Y. 185, 5 Thompson & C. 659; Busey *v.* Hooper, 35 Md. 15; Pierce on Railroads, 4. A statement in the articles of association of a railroad company that it shall be operated as a transfer road, and no discrimination shall be made against any road, and that uniform rates for the same services shall be charged to either persons or railroad companies, does not show that the carriage of passengers was excluded from the purposes of its organization, especially where the articles state that the organization is for the purpose of constructing, operating and maintaining a railroad of standard gauge. Bay City Belt Line R. Co. *v.* Hitchcock, 90 Mich. 533.

[5] See N. Y. Laws 1870, Ch. 135, §1; Beach on the Law of Railways, § 37.

[6] The general acts of the various states are built upon the railroad act of New York, enacted in 1850, Laws, 1850, Ch. 140, Cook on Corporations, § 27.

[7] Rhodes *v.* Piper, 40 Ind. 369. A corporation is entitled to the exclusive

shares into which it is divided, the termini of the road, the names of the counties through which it will pass, its length as near as may be, and the number of directors chosen to manage the affairs of the corporation, together with their names.[1] To these are added various requirements by different states, as that the capital stock shall be not less than a certain sum per mile, or that the places of residence of the directors shall be given, or that the number of years the corporation is to continue shall be stated.[2] The articles must usually be signed by a certain number[3] of subscribers to the capital stock, each of whom must state his place of residence and the number of shares taken by him.[4] The filing of such articles, properly verified or acknowledged, in some public repository, as the office of the secretary of state or of some local recording officer, with the addition, perhaps, of the certificate of some public officer, that the statutes have been complied with, usually creates the corporation.[5] After such articles have been filed they are

use of the name it chooses. Holmes *v.* Holmes, etc., Man. Co., 37 Conn. 278; Goodyear Rubber Co. *v.* Goodyear Rubber Man. Co., 8 Am. & Eng. Corp. Cases, 317; note to Cincinnati Cooperage Co. *v.* Bate, 10 Lewis' Am. R. R. & Corp. R. 653, 672.

[1] See *ante*, § 18. R. S. 1881, Ind., § 3885; 1 N. Y. Laws 1850, Ch. 140, § 1; 1 Beach on Laws on Railways, § 36; Pierce on Railroads, 3. The fact that the articles are required to name the *termini* of the road affords no argument that such road shall be longitudinal. A circular railroad may be incorporated and may exercise the power of eminent domain. State *v.* Martin, 51 Kan. 462. The names of the directors are essential. Dutchess, etc., R. Co. *v.* Mabbett, 58 N. Y. 397. The contrary is held in Eakright *v.* Logansport, etc., R. Co., 13 Ind. 404. But the force of that case as an authority is destroyed by the cases of Bushenback *v.* Attica, etc., R. Co., 43 Ind. 265, and Reed *v.* Richmond Street R. Co., 50 Ind. 342.

[2] Stimson Am. St., § 8523.

[3] The number required is twenty-five in New York, while five are sufficient in many states. Three only are required in Florida and one may incorporate in Iowa. Stimson's Am. Stat. Law, § 8520. Subscriptions of stock upon conditions that can only be fulfilled after incorporation are not to be counted as a part of the necessary preliminary subscription. Fairview R. Co. *v.* Spillman, 23 Ore. 587.

[4] Beach on Law of Railways, § 36; Pierce on Railroads, 3. See *ante*, § 18.

[5] *Ante*, § 18, Pierce on Railroads, 3; Stimson's Am. Stat. Law, §§ 8522, 8526. In Illinois it is said that a corporation can not do business until the certificate of complete organization and a copy of all papers filed with the secretary of state have been duly recorded, and that fraudulently and surreptitiously recording papers of a

usually the best evidence of the existence of a corporation *de jure*.[1] It is held in Colorado that the omission of any of the requisites of a certificate of incorporation required by the general act for the formation of corporations,[2] is a fatal defect, and no *de jure* right is conferred by such certificate to exercise corporate franchises; and, therefore, a certificate of incorporation containing no provision for directors, trustees, or any governing body, as required by the statute, but vesting the control and management of the corporation in a president, vice-president, and attorney, is insufficient to confer a right to exercise such franchises.[3] A statute which requires the certificate of organization of a railroad company to state the termini of the road, and the county or counties through which the road shall pass, applies only to the main line of the company, and, hence, it is unnecessary for the certificate to specify the termini of branch lines or the counties through which they will pass.[4] And it has been held that the description of a terminus as "at or near" a certain place is not so indefinite and defective as to vitiate the articles of incorporation.[5] Where an estimate of the length of the road is required, it may be approximately given.[6]

§ 37. **Particular corporation must be authorized.** — The charter confers corporate rights and privileges only upon those named as incorporators or upon those to whom their rights are transferred by authority of law. Parties can not take a corporate charter with which they have no concern and which belongs to others, and effect a valid corporate organization by a

new corporation, contrary to the agreement of the incorporators, is of no effect. Ricker *v.* Larkin, 27 Ill. App. 625.

[1] Bates *v.* Wilson, 14 Colo. 140, 8 R. R. & Corp. L. J. 144, 24 Pac. 99.

[2] Col. Gen. Stat. 1883, § 238.

[3] Bates *v.* Wilson, 14 Colo. 140, 8 R. & Corp. L. J. 144, 24 Pac. 99. See, also, Reed *v.* Richmond St. R. Co., 50 Ind. 342.

[4] Trester *v.* Missouri Pac. Ry. Co., 33 Neb. 171, 49 N. W. 1110. See *ante*, § 18.

[5] Central R. R. Co. *v.* Penna. R. R. Co., 31 N. J. Eq. 475; Warner *v.* Callender, 20 Ohio St. 190. But see De Long *v.* Schimmel, 58 Ind. 64; Indianapolis, etc., R. R. Co. *v.* Newson, 54 Ind. 121.

[6] Buffalo, etc., R. Co. *v.* Hatch, 20 N. Y. 157.

pretense of user thereunder.[1] The mere purchase of all the corporate property will not give any right to the use of the corporate franchise.[2] Nor can a corporation, it seems, be formed for the purchase and operation of a railroad under a charter merely authorizing a corporation for the purpose of constructing and operating such a road.[3]

§ 38. **Construction of charter—General rules.**—The charter of a railway company, in common with those of other private corporations,[4] is to be strictly but reasonably construed in favor of the public and against the company,[5] wherever their interests conflict. This rule is, perhaps, subject to the qualification

[1] Welch *v.* Old Dominion Min. & R. Co., (Sup. Ct.) 31 N. Y. S. R. 916, 8 R. R. & Corp. L. J. 254, 10 N. Y. Supp. 174. The pretended purchase of the right of way of a railroad company at a sale on execution will give the purchaser no rights under the franchises of the execution-defendant. East Alabama R. Co. *v.* Doe, 114 U. S. 340. The road-bed and superstructure of a railroad built under charter from the state is charged not only in the hands of the original corporation, but of purchasers, with the burden of the charter obligations. Such burden can only be removed by consent of the state. State *v.* Dodge City R. Co., 53 Kan. 377, 36 Pac. R. 747.

[2] Bruffett *v.* Great Western R. Co., 25 Ill. 310; Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, s. c. 75 Am. Dec. 518, and note; Atkinson *v.* Marietta, etc., R. Co., 15 Ohio St. 21, 35.

[3] Gulf, etc., Co. *v.* Morris, 67 Tex. 692, 35 Am. & Eng. R. Cas. 94; State, *ex rel.*, *v.* Beck, 81 Ind. 500. See, also, State *v.* International Invest. Co., 88 Wis. 512, s. c. 43 Am. St. R. 920.

[4] Taylor on Private Corporations, § 122; Waterman on Corporations, 493; Perrine *v.* Chesapeake, etc., Canal Co., 9 How. (U. S.) 172.

[5] The charter of a corporation is to be strictly construed; nothing is to be taken as conceded but what is given in unmistakable terms or by an implication equally clear. Rockland Water Co. *v.* Camden & R. Water Co., 1 L. R. A. 388, 80 Me. 544, 15 Atl. 785; Oregon R. & Nav. Co. *v.* Oregonian R. Co., 130 U. S. 1, 32 L. ed. 837, 5 Ry. & Corp. L. J. 364, 9 Supr. Ct. R. 409; East Line & R. R. R. Co. *v.* Rushing, 69 Tex. 306, 6 S. W. R. 834; Richmond, etc., R. R. Co. *v.* Louisa, etc., R. R. Co., 13 How. (U. S.) 71; Coosaw Mining Co. *v.* State, 144 U. S. 550, s. c. 12 Supr. Ct. R. 689; Bradley *v.* New York, etc., R. Co., 21 Conn. 294; Florida, etc., R. R. Co. *v.* Pensacola, etc., R. Co., 10 Fla. 145; Davis *v.* Old Colony R. Co., 131 Mass. 258; Macon *v.* Macon, etc., R. Co., 7 Ga. 221; Pennsylvania R. Co. *v.* Canal Com'rs, 21 Pa. St. 9; Monongahela, etc., Co. *v.* Kirk, 46 Pa. St. 112, s. c. 84 Am. Dec. 527; People *v.* Broadway R. R. Co., 126 N. Y. 29. "A doubtful charter does not exist, because whatever is doubtful is decisively certain against the corporation." Black, J., in Commonwealth *v.* Erie, etc., R. Co., 27 Pa. St. 339; Jackson County Horse Car Co. *v.* Interstate, etc., Co., 24 Fed. R. 306, 308; Penn. R. R. Co. *v.* Phila., etc., R. R. Co., 10 Pa. Co. Ct. R. 625, 49 Leg. Intel. 5.

that inasmuch as railway corporations are created to further great public interests, their charters will receive a liberal interpretation in furtherance of those interests, when they are apparent to the courts, instead of the strict construction usually given to the charters of private corporations organized exclusively for pecuniary profit.[1] The powers of a corporation under its charter are such, and such only, as are expressly conferred by the statutes granting it, together with such additional powers as are fairly implied[2] as being necessary to the enjoyment of those enumerated.[3] The enumeration of certain powers implies the exclusion of all others not necessary to their enjoy-

[1] Mayor, etc., of Baltimore *v.* Baltimore, etc., R. R. Co., 6 Gill. (Md.) 288, s. c. 48 Am. Dec. 531. See North London R. Co. *v.* Metropolitan Board, 1 Johns. Eng. Ch. 405, 5 Jur. N. S. 1121; State *v.* Stoll, 17 Wall. (U. S.) 425; Bradley *v.* N. Y. & H. R. R. Co., 21 Conn. 294; Mayor, etc., of Baltimore *v.* The Baltimore, etc., R. Co., 21 Md. 50, 93. In this last case, it was held that power given to a railroad company to subscribe in aid of the construction of lateral roads authorizes it to loan money or bonds to such road, and take a mortgage to secure such loan. A grant of power for the performance of a public act is not to be so construed as to make the act impossible, and such a construction is not justified by the rule that private charters are to be strictly interpreted; provisos in a grant will not be allowed to defeat the grant itself. West Branch Boom Co. *v.* Pennsylvania Joint Lumber and Land Co., 22 W. N. C. 303, 121 Pa. 143, 6 Am. St. R. 766, 15 Atl. R. 509. The interpretation of a railroad charter, like the interpretation of any other grant, is the ascertainment of intention. The means reasonably necessary for the enjoyment of a granted property or rights, to the exercise of the granted power, and for the carrying out of the purpose of the grant, are given by implication. Burke *v.* Concord R. Co., 61 N. H. 160. But see Oregon R. & Nav. Co. *v.* Oregonian R. Co., 130 U. S. 1, 5 R. & Corp. L. J. 364; Baltimore & O. R. R. Co. *v.* Dist. of Columbia, 3 McArthur 122; East Line, etc., R. Co. *v.* Rushing, 69 Tex. 306, and authorities cited in last preceding note.

[2] Thomas *v.* Railroad Co., 101 U. S. 71, 82; Commonwealth *v.* Erie, etc., R. Co., 27 Pa. St. 339; Pittsburg, etc., R. Co. *v.* Allegheny County, 63 Pa. St. 126, 135; Delaware, etc., Canal Co. *v.* Camden, etc., R. Co., 16 N. J. Eq. 321, 372; Morris, etc., R. Co. *v.* Sussex R. Co., 20 N. J. Eq. 542, 562; Mobile, etc., R. Co. *v.* Franks, 41 Miss. 494, 511; Central R. Co. *v.* Collins, 40 Ga. 582; Pacific R. Co. *v.* Seely, 45 Mo. 212, 220; State, *ex rel.* Leese, *v.* Atchison, etc., R. Co., 24 Neb. 143; Lower *v.* Chicago, etc., R. Co., 59 Iowa 563, 10 Am. & Eng. R. Cas. 17.

[3] Enfield Toll Bridge Co. *v.* Hartford R. Co., 17 Conn. 454; Davis *v.* Old Colony R. R. Co., 131 Mass. 258; Housatonic R. Co. *v.* Lee, etc., R. Co., 118 Mass. 391; Shawmut Bank *v.* Plattsburgh, etc., R. Co., 31 Vt. 491; Morris, etc., R. Co. *v.* Newark, 10 N. J. Eq. 352; Thomas *v.* Railroad Co., 101 U. S. 71; Ross, etc., Co. *v.* Southern Co., 72 Fed. 957.

ment.[1] The phrase "necessary powers," however, generally means such as are convenient, useful and appropriate to the specific power granted.[2] Ambiguity in the terms used may vitiate the charter[3] as all doubtful expressions will generally be construed against the corporation.[4] A charter, however, like a contract between individuals,[5] is to be construed fairly and reasonably,[6] according to the natural import of the language used, with reference to the purposes and objects of the corporation,[7] and with a view to carrying out the intention of the legislature in granting it.[8] Where similar franchises are granted to two corporations, the charters must, if possible, receive such a construction that effect may be given to both, and neither be held to be in derogation of the other.[9]

§ 39. **Grants of monopolies and powers in derogation of public rights—Perpetuity.**—The rule of strict construction against corporations is peculiarly applicable to grants of exclusive privileges, monopolies, and powers in derogation of public rights, or the like. In such cases it is generally held that nothing passes by implication, and it is said that "this rule applies with peculiar force to articles of association, which are framed under general laws, and which are a substitute for a legislative charter, and assume and define the powers of the corporation by the mere act of the associates, without any su-

[1] Thomas *v.* Railroad Co., 101 U. S. 71, 82; Tennessee, etc., R. Co. *v.* Adams, 3 Head. (Tenn.) 596.

[2] McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 413, Marshall, C. J.; Hood *v.* New York, etc., R. Co., 22 Conn. 1, 16; Buffett *v.* Troy, etc., R. Co., 40 N. Y. 168, 176; Buffit *v.* Troy, etc., R. Co., 36 Barb. 420; Burrill's Law Dict., title "Necessary."

[3] Waterman on Corp., 493.

[4] Scales *v.* Pickering, 4 Bing. 448; Richmond, etc., R. Co. *v.* Louisa, etc., R. Co., 13 How. (U. S.) 71; Commonwealth *v.* Central Pass. R. Co., 52 Pa. St. 506; Rice *v.* Railroad Co., 1 Black (U. S.) 358.

[5] Waterman on Corp., § 138.

[6] Green Bay, etc., R. Co. *v.* Union Steamboat Co., 107 U. S. 98; Brown *v.* Winnisimmet Co., 11 Allen (Mass.) 326, 336; Commonwealth *v.* Erie, etc., R. Co., 27 Pa. St. 339.

[7] Waterman on Corp., 484.

[8] Waterman on Corp., § 138, and cases cited.

[9] Pennsylvania R. Co.'s Appeal, 93 Pa. St. 150, 3 Am. & Eng. R. Cas. 507; Hudson Riv. Tel. Co. *v.* Watervliet Turnp. Co., 56 Hun (N. Y.) 67.

pervision of the legislature or of any public authority."[1] Thus, exclusive privileges and monopolies are not to be presumed, and if not unequivocally granted must be deemed to be withheld.[2] So, grants in derogation of public rights,[3] or of the rights and franchises of other corporations,[4] are to be strictly construed. And, "as between a construction which will place a limitation on the grant and one which will give rise to a perpetuity, it is clear that it is the duty of the court, in favor of the public, to impose the limitation."[5]

§ 40. **Practical construction.**—It is a familar rule that, in case of doubt, the practical exposition or construction of a contract by the parties is entitled to great, if not controlling influence, and will usually be followed by the courts.[6] This rule has been applied to statutes which have received a contemporane-

[1] Central Transp. Co. *v.* Pullman's Car Co., 139 U. S. 24, 49, *per* Gray, J.; Oregon Ry. *v.* Oregonian Ry., 130 U. S. 1, 27.

[2] Charles River Bridge *v.* Warren Bridge, 11 Pet. (U. S.) 420; Lehigh, etc., Co. *v.* Borough of Easton, 121 U. S. 388; Richmond, etc., R. R. Co. *v.* Louisa R. R. Co., 13 How. (U. S.) 71; People *v.* Broadway R. R. Co., 126 N. Y. 29; Indianapolis Cable R. R. Co. *v.* Citizens R. R. Co., 127 Ind. 369; East St. Louis, etc., R. R. *v.* East St. Louis Un. R. R., 108 Ill. 265; Jackson Co. Horse R. Co. *v.* Interstate R. Transit Co., 24 Fed. R. 306; De Lancey *v.* Ins. Co., 52 N. H. 581; Gaines *v.* Coates, 51 Miss. 335; Georgia R. R. Co. *v.* Smith, 70 Ga. 694.

[3] Fertilizing Co. *v.* Hyde Park, 97 U. S. 659; Turnpike Co. *v.* Illinois, 96 U. S. 63. Thus, property already devoted to a public use can not be taken and used by a corporation unless the right is clearly granted. People *v.* Thompson, 98 N.Y. 6; People *v.* Newton, 112 N. Y. 396; Stamford *v.* Borough of Stamford Horse R. Co., 56 Conn. 381; Elliott on Roads and Streets, 167–169.

[4] Pennsylvania R. R. Co.'s Appeal, 93 Pa. St. 150; Packer *v.* Sunbury, etc., R. R. Co., 19 Pa. St. 211; City of Bridgeport *v.* N. Y. R. R. 36 Conn. 255; Worcester & N. R. R. Co. *v.* Railroad Coms., 118 Mass. 561.

[5] City of Detroit *v.* Detroit City Ry. Co., 56 Fed. R. 867, 886. See, also, Coosaw Min. Co. *v.* State, 144 U. S. 550, s. c. 12 Sup. Ct. R. 689.

[6] Central Trust Co. *v.* Wabash, etc., Ry. Co., 34 Fed. R. 254; District of Columbia *v.* Gallaher, 124 U. S. 505, s. c. 8 Sup. Ct. R. 585; Chicago *v.* Sheldon, 9 Wall. (U. S.) 50; Vinton *v.* Baldwin, 95 Ind. 433; Reissner *v.* Oxley, 80 Ind. 580, and authorities there cited; Frazier *v.* Myers, 132 Ind. 71; Union Pac. R. R. Co. *v.* Anderson, 11 Colo. 293, s. c. 18 Pac. R. 24; Bishop on Contracts, § 598; Clark on Contracts, 594.

ous construction,[1] and even to constitutional provisions.[2] It follows, therefore, that the practical construction of a grant to a railroad company established by years of uniform usage, acquiesced in by the public and all parties interested, will be of great weight in determining the construction of the grant and will usually be followed by the courts if the meaning or extent of the grant would otherwise be doubtful.[3] But this rule should not, perhaps, be carried to the extent to which it is carried by some of the courts in the construction of ordinary contracts, that is, it should not be so applied as to enable corporations to acquire rights, as against the public, which are clearly not given to them, either expressly or impliedly, by their charters or grants from the public. In other words, the mere assumption of a right on their part and inaction on the part of the public will not necessarily be conclusive that such a right exists, especially as against the plain letter of the law.[4]

§ 41. **Charter to build and operate a railroad—What powers are included.**—The grant of authority to build and operate a railroad carries with it, when necessary to the enjoyment of the franchise, the implied authority to condemn lands for a right of way;[5] to appropriate land of the state over which the chartered route runs, although no provision is made for compensation for it when taken;[6] to erect bridges over navigable

[1] United States *v.* Philbrick, 120 U. S. 52; Hovey *v.* State, 119 Ind. 386, 395; People *v.* Board, 100 Ill. 495; Rogers *v.* Goodwin, 2 Mass. 475; Pike *v.* Megoun, 44 Mo. 491; State *v.* Parkinson, 5 Nev. 15. In Bruce *v.* Schuyler, 4 Gilm. (Ill.) 221, it is said: "It has always been regarded by the courts as equivalent to a positive law." Approved in Board of Comrs. *v.* Bunting, 111 Ind. 143.

[2] Bingham *v.* Miller, 17 Ohio, 445; Johnson *v.* Joliet, 23 Ill. 202; State *v.* Mayhew, 2 Gill (Md.) 487.

[3] Port of Mobile *v.* Louisville, etc., R. R. Co., 84 Ala. 115, s. c. 5 Am. St. R. 342.

[4] Powers that can only be obtained by charter or grant can not be acquired by assuming, without authority, to exercise them; nor is the public, although it may be represented by its officers, in a situation to protect its rights or take action to the same extent as are individuals.

[5] Tennessee, etc., R.R. Co. *v.* Adams, 3 Head (Tenn.) 596.

[6] Indiana Cent. R. Co. *v.* State, 3 Ind. 421. But this doctrine is of doubtful soundness.

streams;[1] to repair bridges where it is authorized to build;[2] to construct its road across a highway[3] or railroad[4] between its authorized *termini;* but not, ordinarily, along and upon a highway[5] or property already devoted to railroad use;[6] to take gravel and material for use in construction of the road-bed, and water for the use of the engines;[7] to run trains of cars over the road by the use of steam as a motive power, even though it be so near to a public highway as to frighten horses driven thereon;[8] and to take tolls for the carriage of goods and passengers.[9] The

[1] Fall River Iron Works Co. *v.* Old Colony, etc., R. Co., 5 Allen (Mass.) 221; Tennessee R. Co. *v.* Adams, 3 Head. (Tenn.) 596; Hamilton *v.* Vicksburg, etc., R. Co., 34 La. Ann. 970; Miller *v.* Prairie du Chien, etc., R. Co., 34 Wis. 533. In Schofield *v.* Pennsylvania, etc., R. Co., 12 Pa. Co. Ct. R. 122, it was held that the railroad had power to build a branch road extending a thousand feet along the bed of a navigable stream. But see Stevens *v.* Erie R. R. Co., 21 N. J. Eq. 259.

[2] Central Trust Co. *v.* Wabash, etc., R. Co., 32 Fed. R. 566.

[3] State *v.* Montclair R. Co., 35 N. J. L. 328; Lewis *v.* Germantown, etc., R. R. Co., 16 Phila. (Pa.) 608; White River Turnp. Co. *v.* Vermont Cent. R. R. Co., 21 Vt. 590.

[4] St. Louis J. & C. R. R. Co. *v.* Springfield, etc., R. R. Co., 96 Ill. 274; City of Ft. Wayne *v.* Lake Shore, etc., Ry. Co., 132 Ind. 558, s. c. 32 Am. St. R. 277, citing Elliott on Roads and Streets, 169.

[5] Springfield *v.* Connecticut River R. Co., 4 Cush. (Mass.) 63; St. Louis, etc., R. R. Co. *v.* Haller, 82 Ill. 208; Kenton County Court *v.* Bank Lick Turnp. Co., 10 Bush (Ky.) 529.

[6] Housatonic, etc., R. R. Co. *v.* Lee, etc., R. R. Co., 118 Mass. 391; Contra Costa, etc., R. R. Co. *v.* Moss, 23 Cal. 323; Alexandria, etc., R. R. Co. *v.* Alexandria, etc., Co., 75 Va. 780; City of Seymour *v.* Jeffersonville, etc., R. R. Co., 126 Ind. 466; Lewis on Eminent Domain, § 267. Express or at least clearly implied authority is generally necessary in such cases. Central City Horse Ry. Co. *v.* Fort Clark Horse Ry. Co., 81 Ill. 523; Eastern R. R. Co. *v.* Boston, etc., R. R. Co., 111 Mass. 125; Baltimore, etc., R. R. Co. *v.* North, 103 Ind. 486; Elliott on Roads and Streets, 167, 168. See, also, Denver & R. G. Ry. Co. *v.* Denver, etc., Co., 17 Fed. R. 867; Railway Co. *v.* Alling, 99 U. S. 463, as to respective rights of two railroad companies in a narrow canon or defile. Other authorities, and a full treatment of this subject will be found in the chapter on Eminent Domain.

[7] See Morgan *v.* Louisiana, 93 U. S. 217; also, Strohecker *v.* Alabama, etc., R. R. Co., 42 Ga. 509; Pennsylvania R. R. Co., *v.* Miller, 112 Pa. St. 34; Aldrich *v.* Drury, 8 R. I. 554; Earlywine *v.* Topeka, etc., R. R. Co., 43 Kan. 746; Henry *v.* Dubuque, etc., R. R. Co., 2 Iowa 288; Taylor *v.* New York, etc., R. R. Co., 38 N. J. L. 28. But see Preston *v.* Dubuque, etc., R. R. Co., 11 Iowa 15.

[8] Bordentown, etc., T. Co. *v.* Camdon, etc., R., Co., 17 N. J. L. 314, 319.

[9] See Morgan *v.* Louisiana, 93 U. S. 217. "Courts have construed the charter of a canal or railroad company, in relation to the right to take freight or

grant of a right to construct a railroad between two towns has been held to carry implied authority to run a branch line along a street of one of the towns to reach a depot and turn-table which lay off from the direct line.[1] Power to build a road "to" or "from" a certain town, or to construct works "at" such a town, includes power to build to such point within the corporate limits suitable for the transaction of its business and the accommodation of the public as may be fixed upon by the company and the municipal authorities.[2] "A railroad company whose charter gives it the right to build its road from a certain city is not barred from making the union depot in such city its terminus by the fact that it began to construct its road from a point in the outskirts of the city, and for some time ran trains from such point, when it appears the company never made any permanent improvements at such point, and that from the first

toll, in favor of the public and against the company." 1 Waterman on Corp. § 138, citing Stourbridge Canal Co. *v.* Wheeley, 2 B. & Adol. 793; Barrett *v.* Stockton, etc., R. Co., 2 Man. & Gr. 134, 7 Man. & Gr. 870; Gildart *v.* Gladstone, 11 East 675; Proprs. of Leeds, etc., Canal *v.* Hustler, 1 Barn. & Cress. 424; Camden, etc., R. Co. *v.* Briggs, 22 N. J. L. 623. Where the charter of a canal imposed a toll on goods carried on vessels passing through the canal, and on such vessels as had not sufficient goods aboard to yield a toll of four dollars, it was held that the company had no right to charge toll for passengers, and a vessel laden exclusively with passengers was entitled to navigate the canal upon payment of the toll imposed upon an empty vessel. Perrine *v.* Chesapeake, etc., Canal Co., 9 How. (U. S.) 172.

[1] Flanagan *v.* Great Western Ry. Co., L. R. 7. Eq. Cas. 116. See, also, Clarke *v.* Cuckfield Union, 21 L. J. Q. B. 349; New Orleans, etc., R. Co. *v.* Second Municipality of New Orleans, 1 La. Ann. 128; Knight *v.* Carrollton R. Co., 9 La. Ann. 284. But see Northeastern R. Co. *v.* Payne, 8 Rich. L. (S. C.) 177, to the effect that authority to build "from" a city does not give a right to build within the city limits.

[2] Moses *v.* Pittsburgh, etc., R. Co., 21 Ill. 515, 522; Mohawk Bridge Co. *v.* Utica, etc., R. Co., 6 Paige Ch. (N. Y.) 554; Commonwealth *v.* Erie, etc., R. Co., 27 Pa. St. 339, 344. These terms are generally regarded as inclusive and authorize a location within the city or place named. Chicago, etc., R. R. Co. *v.* Chicago, etc., R. R. Co., 112. Ill. 589, s. c. 25 Am. & Eng. R. R. Cas. 158; Rio Grande, etc., R. R. Co. *v.* Brownsville, 45 Tex. 88; Mason *v.* Brooklyn, etc., R. R. Co., 35 Barb. (N. Y.) 373. *Contra*, Northeastern R. R. Co. *v.* Payne, 8 Rich. L. (S. C.) 177. The term "between" has also been construed as inclusive. Morris, etc., R. R. Co. *v.* Central, etc., R. R. Co., 31 N. J. L. 205.

it made efforts to extend its line to the union depot."[1] But no authority is given to build the road into such a town in a direction different from that of the general direction of the road.[2] A company chartered to build a railroad for the purpose of transporting lumber for shipment by water, with authority to construct the road "to the place of shipping lumber" on a river, may lawfully appropriate lands for a right of way across the flats or overflowed lands within the ordinary banks of the river and extend its tracks across such lands to a convenient navigable part of the river from which lumber may be shipped.[3] A railroad corporation has implied authority to build and maintain restaurants for its passengers;[4] to erect or secure the erection of a telegraph line along its route;[5] and to erect and maintain depots, car houses, water tanks, repair shops, and the like.[6] It also has power to make reasonable rules and regulations for the safety and convenience of its passengers[7] and the management of its road and business.[8]

§ 42. Other powers of railroad companies—Implied powers included in certain grants.—A railroad company may offer a

[1] Colorado E. Ry. Co. *v.* Union Pac. Ry. Co., 41 Fed. R. 293.

[2] Savannah, etc., R. Co. *v.* Shiels, 33 Ga. 601.

[3] Peavey *v.* The Calais R. Co., 30 Me. 498, 1 Am. R. Cas. 147.

[4] Flanagan *v.* Great Western R. R. Co., L. R. 7 Eq. Cas. 116.

[5] Prather *v.* Western U. Tel. Co., 89 Ind. 501; Pittsburg, etc., R. Co. *v.* Shaw, (Pa.) 36 Am. & Eng. R. Cas. 453; Marietta, etc., R. Co. *v.* Western U. Tel. Co., 38 Ohio St. 24, 10 Am. & Eng. R. Cas. 387; Western U. Tel. Co. *v.* Rich, 19 Kan. 517, 27 Am. R. 159. Or scales at its stations for weighing freight. London, etc., R. R. Co. *v.* Price, L. R. 11 Q. B. Div. 485, s. c. 13 Am. & Eng. R. R. Cas. 128.

[6] Waterman on Corp., § 138, citing State *v.* Mansfield, 3 Zab. (N. J.) 510; Wright *v.* Carter, 3 Dutcher (N. J.) 76; State *v.* Newark, 1 Dutcher (N. J.) 315. But it has been held that a railroad has no implied power to erect houses for its employes nor to establish factories for making its own rails and rolling stock, nor to do any other acts not necessary to the successful operation of the road. State *v.* Mansfield, *supra*.

[7] Chicago, etc., R. R. Co. *v.* Williams, 55 Ill. 185; Gray *v.* Cincinnati, etc., R. R. Co., 11 Fed. R. 683, s. c. 6 Am. & Eng. R. R. Cas. 588.

[8] Chicago, etc., R. R. Co. *v.* People, 56 Ill. 365, s. c. 8 Am. R. 690; Reagan *v.* St. Louis, etc., R. R. Co., 93 Mo. 348; Cleveland, etc., R. R. Co. *v.* Bartram, 11 Ohio St. 457. See By-laws, Rules and Regulations, Chapter X.

reward for the detection of persons obstructing its track.[1] Under an authority to erect a bridge, the corporation may condemn land for abutments[2] and may build necessary approaches.[3] So, under a general authority to condemn land for a right of way, a corporation may take land for depots, water-tanks, round houses, shops, and coal and wood yards, and such other works as are necessary to the operation of the road,[4] and it may build side tracks to the establishments of large shippers as a power incidental to its expressly granted powers.[5] It is said that the burden is upon those asserting the fact to show that the charter of a corporation authorizes it to take or convey lands,[6] and those claiming such authority by implication must show that it is necessary to the enjoyment of the franchises expressly granted.[7] The power to make contracts includes power to dispose of securities received in the prosecution of the objects for which the company is chartered.[8] A railroad corporation has implied authority to contract generally in the course of its legitimate business, where not prohibited or restricted by some express provision of law.[9] Thus, it may make proper traffic arrangements with other companies[10] and permit them to use

[1] Central R., etc., Co. *v.* Cheatham, 85 Ala. 292, 37 Am. & Eng. R. Cas. 282.

[2] Linton *v.* Sharpsburg, etc., Co., 1 Grant's Cas. (Pa.) 414.

[3] Slatten *v.* Des Moines, etc., R. Co., 29 Iowa 148, 4 Am. R. 205.

[4] State *v.* Comrs. of Mansfield, 23 N. J. L. 510; Vermont Cent. R. Co. *v.* Burlington, 28 Vt. 193; Nashville, etc., R. Co. *v.* Cowardin, 11 Humph. (Tenn.) 348.

[5] Wilson *v.* Furness R. Co., L. R. 9 Eq. Cas. 28; Chicago, etc., R. Co. *v.* Porter, 43 Minn. 527, 43 Am. & Eng. R. Cas. 170; Getz's Appeal, 65 Pa. St. 1, 3 Am. & Eng. R. Cas. 186. But see Pittsburg, etc., R. Co. *v.* Benwood Iron Works, 31 W. Va. 710, 36 Am. & Eng. R. Cas. 531, where it is held that a railroad company can not exercise the power of eminent domain to secure a right of way for a side track to a steel mill, even where there is evidence that all who wish to avail themselves of the proposed switch for shipping purposes may do so.

[6] Lumbard *v.* Aldrich, 8 N. H. 31.

[7] Rensselaer, etc., R. Co. *v.* Davis, 43 N. Y. 137; *In re* New York Cent. R. Co., 66 N. Y. 407.

[8] 1 Rorer on Railroads, 35.

[9] Racine, etc., R. Co. *v.* Farmers', etc., Co., 49 Ill. 331; Philadelphia, etc., R. Co. *v.* Hickman, 28 Pa. St. 318; Mobile, etc., R. Co. *v.* Talman & Ralston, 15 Ala. 472; Chicago, etc., R. Co. *v.* Howard, 7 Wall. (U. S.) 392; Pixley *v.* Western Pac. R. Co., 33 Cal. 183; Arrington *v.* Savannah, etc., R. Co., 95 Ala. 434; Chattanooga, etc., R. Co. *v.* Davis, 89 Ga. 708.

[10] Sussex, etc., R. Co. *v.* Morris, etc., R. Co., 19 N. J. Eq. 13; Wheeler *v.*

its terminals.[1] It may borrow money, and give negotiable notes,[2] or issue or guarantee bonds, to carry into effect the object of the organization.[3] Authority to build a branch or lateral road implies power to condemn lands for a right of way for such road,[4] and to construct a branch line running in the same general direction as the main line, even though it be built to connect with the main line of another road,[5] and even, it has been held, to build a short elevated road from the original terminus of its route along a public landing.[6] A limitation as to the time within which the "works hereby required" shall be finished, will usually be held to apply only to the building and equipping of the main line, and the building of lateral roads will be understood to be optional with the company.[7]

§ 43. **Amendment—Power must be reserved.**—The charter of a corporation constitutes a contract between the corporation

San Francisco, etc., R. R. Co., 31 Cal. 46, s. c. 89 Am. Dec. 147; Perkins *v.* Portland, etc., R. R. Co., 47 Me. 573, s. c. 74 Am. Dec. 507.

[1] Miller *v.* Green Bay, etc., R. R. Co., (Minn.) 26 L. R. A. 443.

[2] Chicago, etc., R. Co. *v.* Howard, 7 Wall. (U. S.) 392; White Water C. Co. *v.* Vallette, 21 How. (U. S.) 414; Wood *v.* Whelen, 93 Ill. 153; Branch *v.* Atlantic, etc., R. Co., 3 Woods 481.

[3] Cases cited preceding note. *Contra*, in England, Bateman *v.* Mid-Wales R. Co., L. R. 1 C. P. 499.

[4] Newhall *v.* Galena, etc., R. Co., 14 Ill. 273. The right to "construct such branches as the directors may deem necessary," conferred upon a railroad corporation by its charter gives it a continuing power of branch building which is not taken away by a subsequent act requiring the company within a certain time to complete its road "with one or more tracks, sidings, depots and appurtenances." Pittsburg, etc., R. Co. *v.* Pittsburg, etc., R. Co., 159 Pa. St. 331.

[5] Blanton *v.* Richmond, etc., R. Co., 86 Va. 618, 43 Am. & Eng. R. Cas. 617. Where the charter of a railroad corporation empowers it to build only one specified branch road, another road, incorporated under the laws of a different state, though constructed and operated by the first road, is not a "branch" of such road within the meaning of a deed reserving a right of way over such premises in favor of such road or any of its branches. Biles *v.* Tacoma, etc., R. Co., 5 Wash. St. 509, 32 Pac. R. 211. Where a railroad company's charter expressly authorizes it to build branch roads, contracts entered into by it with a construction company for the construction of a projected branch road are valid and may be enforced. Arrington *v.* Savannah, etc., R. Co., 95 Ala. 434.

[6] McAboy's Appeal, 107 Pa. St. 548.

[7] Blanton *v.* Richmond, etc., R. Co.,

and the state, and is not subject to amendment or repeal,[1] unless the right to alter or revoke is reserved.[2] And it has been held that an express reservation by the legislature of power to repeal a charter can give no authority to take away or destroy property lawfully acquired or created under authority conferred

86 Va. 618. But see Newhall *v.* Galena, etc., R. Co., 14 Ill. 273, where it is held that a limitation or extension of time in which to construct should, by intendment, be applied to the lateral or branch lines equally with the main line of the road. In Commonwealth *v.* New York, etc., R. Co., 10 Pa. Co. Ct. R. 129, a railroad and mining company was authorized by its charter to build a railroad or railroads from any lands held by them to a certain railroad, or to connect any two or more railroads which might be constructed by them in either or both of two counties named. The court held that the building of one road did not exhaust the powers of the company, and that having built one railroad and finding it unprofitable, the building of another did not operate to forfeit the company's charter.

[1] Dartmouth College *v.* Woodward, 4 Wheat.(U.S.) 518; Piqua Branch Bk. *v.* Knopp, 16 How. (U. S.) 369; State *v.* Noyes, 47 Me. 189; Commonwealth *v.* Erie, etc., Transp. Co., 107 Pa. St. 112; Pennsylvania R. Co. *v.* Baltimore, etc., R. Co., 60 Md. 263; Houston, etc., R. Co. *v.* Texas, etc., R. Co., 70 Tex. 649.

[2] The several states now provide by general laws or by constitutional provisions that all charters granted shall be subject to alteration, amendment and repeal, at the discretion of the legislature. Stimson's Am. Stat. Law, §§ 442, 8003. See St. Louis, etc., R. Co. *v.* Ryan, 56 Ark. 245; Mowrey *v.* Indianapolis, etc., R. Co., 4 Biss. (U. S.) 78; New Orleans, etc., Co. *v.* Harris, 27 Miss. 517; Commonwealth *v.* Fayette, etc., R. R. Co., 55 Pa. St. 452; Delaware R. R. Co. *v.* Tharp, 5 Harr. (Del.) 454; Greenwood *v.* Union Freight R. R. Co., 105 U. S. 13; *In re* New York, El. R. R. Co., 70 N. Y. 327; 1 Beach Priv. Corp., §§ 36, 57. Exemption from legislative interference, given by charter, "must appear by such clear and unmistakable language that it can not be reasonably construed consistently with the reservation of the power by the state." Georgia R. & Big. Co. *v.* Smith, 128 U. S. 174, 32 L. ed. 377, 16 Wash. L. R. 749, 9 Sup. Ct. R. 47. "The condition is implied in every grant of corporate existence, that the corporation shall be subject to such reasonable regulations, in respect to the general conduct of its affairs, as the legislature may from time to time prescribe, which do not materially interfere with or obstruct the substantial enjoyment of the privileges the state has granted, and serve only to secure the ends for which the corporation was created." Hill *v.* Merchants Mut. Ins. Co., 134 U. S. 515, 33 L. ed. 994, 7 Ry. & Corp. L. J. 442, 10 Sup. Ct. R. 589; Reed *v.* Gettysburg B. F. M. Asso., 129 Pa. 329, 24 W. N. C. 292, 18 Atl. R. 130; Montclair Tp. *v.* New York & G. L. R. Co., 6 R. R. & Corp. L. J. 385, 18 Atl. R. 242, 45 N. J. Eq. (18 Stew.) 436, 40 Am. & Eng. R. Cas. 342. Exemption from future general legislation, either by a constitutional provision or by an act of the legisla-

by the charter;[1] nor to disturb, affect or impair vested rights either of the corporation or of its shareholders.[2] It has no power to make any material or essential alteration in the contract between the members themselves and the corporation; and therefore a new charter obtained by the directors of a railroad company, without the consent of the stockholders, changing the capital stock and route, is not binding upon the stockholders.[3] But the right of the state to amend the charter of a railroad company is not abridged or affected by executory contracts between the company and a construction company, and between the latter and subcontractors, touching the construction and equipment of the road; for all parties contracting with a corporation must take notice of the conditions on which it holds its franchises, and of its subjection to the legislative

ture, does not exist unless it is given expressly, or unless it follows by an implication equally clear with express words. In the absence of any prior contract exempting it from liability to future general legislation, a railroad corporation takes its charter subject to the general law of the state and to such changes as may be made in such general law, and subject to future contitutional provisions and future general legislation. Chicago, M. & St. P. R. Co. *v.* Minnesota, Minn. R. R. & W. Com., 134 U. S. 418, 33 L. ed. 970, 41 Alb. L. J. 325, 2 Advocate 182, 42 Am. & Eng. R. Cas. 285, 10 Sup. Ct. R. 462, 702. This rule applies to future general legislation as to compensation for property taken in the exercise of eminent domain. Pennsylvania R. Co. *v.* Miller, 132 U. S. 75, 33 L. ed. 267, 129 Pa. 181, 25 W. N. C. 1, 46 Phila. Leg. Int. 487, 10 Sup. Ct. R. 34.

[1] People *v.* O'Brien, 2 L. R. A. 255, 111 N. Y. 1, 19 N. Y. S. R. 173, 7 Am. St. R. 684, 18 N. E. R. 692. But this decision is, in some respects, of doubtful soundness. See Greenwood *v.* Union Freight R. R. Co., 105 U. S. 13; Close *v.* Glenwood Cemetery, 107 U. S. 466. And compare Orr *v.* Bracken County, 81 Ky. 593; County of San Mateo *v.* Southern, etc., R. Co., 8 Sawy. (U. S.) 238, 279.

[2] Hill *v.* Glasgow R. Co., (C. C. D. Ky.) 41 Fed. R. 610; Bryan *v.* Board, 90 Ky. 322, 7 Ry. & Corp. L. J. 389; Kenosha, etc., R. R. Co. *v.* Marsh, 17 Wis. 13; City of Knoxville *v.* Knoxville, etc., R. R. Co., 22 Fed. R. 758; Troy, etc., R. R. Co. *v.* Kerr, 17 Barb. (N. Y.) 581. "After vested rights have been acquired, the charter of a corporation can not be so amended as to impair them, unless the power to amend or repeal is expressly reserved; but where the original and amendatory acts are passed at the same session of the legislature, with only a brief interval between, during which there is no acceptance of the provisions of the original act and no rights are acquired thereunder, the amendatory act is valid." Cincinnati, H. & I. R. R. Co. *v.* Clifford, 113 Ind. 460; Nashville Co. *v.* State, (Tenn.) 34 S. W. 4.

[3] Snook *v.* Georgia Imp. Co., 83 Ga. 61, 38 Am. & Eng. R. Cas. 492, 9 S. E. R. 1104. See, also, Zabriskie *v.* Hack-

will.[1] Where a special charter containing no provision for its amendment is granted to a railroad company while an act is in force declaring that the charter of every corporation created under a general law, and every charter granted by act of the general assembly, unless such act declares the contrary, is subject to amendment, it has been held that the general assembly may impose upon such railroad, in common with others, the burden of paying the salary and expenses of a state officer to whom is given the supervision of the railroads of the state.[2] It may also impose upon the railway company the duty of constructing and maintaining bridges on the line of highways across rights of way which it has merely graded without laying the rails.[3] Such amendments may be made by the enactment of a general railroad act which applies to the specially chartered corporation.[4] A charter granting to a railway company the privilege of choosing its own route between two places may be amended by requiring it to pass through an intermediate point, even after its route has been located and contracts have been let for its construction.[5] And it is held that a change of a charter within a month after it was granted, so as to make the corporation liable to pay a certain percentage of its gross receipts from the operation of a street railroad, instead of fifty dollars per car, is within the general authority to alter a charter, under the New York statute.[6]

§ 44. **Police regulations.**—Even where no power to amend the charter is reserved, the railroad company is still governed by

ensack, etc., R. R. Co., 18 N. J. Eq. 178.

[1] Macon, etc., R. Co. *v.* Gibson, (Stamps *et al.*) 85 Ga. 1, 43 Am. & Eng. R. Cas. 318, 11 S. E. R. 442, 21 Am. St. R. 135.

[2] Charlotte, etc., R. Co. *v.* Gibbes, 27 S. Car. 385, 31 Am. & Eng. R. Cas. 464, 4 S. E. R. 49.

[3] Inhabitants of Township of Montclair *v.* New York, etc., R. Co., 45 N. J. Eq. 436, 40 Am. & Eng. R. Cas. 342, 18 Atl. R. 242.

[4] Inhabitants of Township of Montclair *v.* New York, etc., R. Co., 45 N. J. Eq. (18 Stew.) 436, 6 R. R. & Corp. L. J. 385, 40 Am. & Eng. R. Cas. 342, 18 Atl. R. 242.

[5] See Macon, etc., R. Co. *v.* Gibson, (Stamps) 85 Ga. 1, 43 Am. & Eng. R. Cas. 318, 11 S. E. R. 442.

[6] City of New York *v.* Twenty-third Street R. Co., 5 R. R. & Corp. L. J. 583, 113 N. Y. 311, 22 N. Y. S. R. 958, 21 N. E. R. 60.

the principle that every owner of property, however absolute and unqualified his title, holds it subject to the implied condition that the use shall not be injurious to the public, and is amenable to regulations prescribed under the police power of the state.[1] Thus, it has been held that railroad companies may be compelled by statutes passed after their incorporation to fence their tracks,[2] to provide accommodations for their passengers, and the like.[3] So, they may have imposed upon them a liability for setting fire to property along their right of way.[4] Other illustrations and a fuller treatment of this subject will be found elsewhere.[5]

§ 45. **Material amendments require unanimous consent of stockholders—What are material.**—It is a general rule that fundamental and material amendments can not be made by the directors or majority stockholders so as to bind the minority stockholders without their consent. Such amendments require the unanimous consent of the stockholders, and can not be made by the majority stockholders under general laws authorizing the filing of amended articles of association unless the minority stockholders consent.[6] But

[1] Power of state over railroads as restricted by legislative charters, 32 Cent. L. J. 181.

[2] Wilder *v.* Maine Central R. R. Co., 65 Me. 332; Illinois Cent. R. R. Co. *v.* Willenborg, 117 Ill. 203, s. c. 7 N. E. R. 698; Thorpe *v.* Rutland, etc., R. R. Co., 27 Vt. 140, 148; New Albany, etc., R. R. Co. *v.* Tilton, 12 Ind. 3.

[3] State *v.* New Haven, etc., R. R. Co., 43 Conn. 351; State *v.* Indiana, etc., R. R. Co., 133 Ind. 69, 32 N. E. R. 817. To provide for safety of employes, State *v.* Nelson, 52 Ohio St. 88, s. c. 26 L. R. A. 317; State *v.* Hoskins, (Minn.) 25 L. R. A. 759, and note. To fence tracks, stop trains at crossings, slacken speed, post tariffs, charge no more than a certain fixed rate, etc. Stone *v.* Farmers' Loan & Trust Co., 116 U. S. 307, s. c. 6 Sup. Ct. R. 334; Smith *v.* Alabama, 124 U. S. 465, s. c. 8 Sup. Ct. R. 564.

[4] Rodemacker *v.* Milwaukee, etc., R. R. Co., 41 Iowa 297; Lyman *v.* Boston, etc., R. R. Co., 4 Cush. (Mass.) 288; Grissell *v.* Housatonic, etc., R. R. Co., 54 Conn. 447, s. c. 32 Am. & Eng. R. R. Cas. 349.

[5] See chapter on State Control.

[6] New Orleans, etc., R. R. Co., *v.* Harris, 27 Miss. 517; Hartford & N. H. R. R. Co. *v.* Croswell, 5 Hill (N. Y.) 383; Marietta, etc., R. R. Co. *v.* Elliott, 10 Ohio St. 57; Sparrow *v.* Evansville, etc., R. R. Co., 7 Ind. 369; Union Lochs, etc., Canals, *v.* Towne, 1 N. H. 44, s. c. 8 Am. Dec. 32; Mowrey *v.* Indianapolis, etc., R. R. Co., 4 Biss. (U. S.) 78; Printing House *v.* Trustees, 104 (U. S.) 711. The authorities are collected in the elaborate note

immaterial amendments, or those for the benefit of the corporation and in furtherance of its original purposes, may usually be made or accepted by a majority of the stockholders.[1] It is difficult to formulate any general rule for determining what are material amendments and what are immaterial. But it may be said, with a reasonable degree of accuracy, that an amendment that changes the rights of the stockholders *inter se*, alters the original object of the corporation, or adds to or restricts its franchises, rights and powers in such a manner as to increase the liabilities of the stockholders or deprive them of vested rights, is material and requires the consent of all the stockholders,[2] while an amendment which merely clothes the corporation with such additional immunities and privileges as are strictly in furtherance of the original design, without substantially adding to or restricting the same and without materially affecting the rights of the stockholders *inter se*, may be regarded as immaterial and accepted by a majority of the

to Commonwealth *v.* Cullen, (Pa.) 53 Am. Dec. 450, 462. See, also, 1 Beach Priv. Corp., § 44; 1 Thomp. Corp., § 72; 2 Morawetz Priv. Corp., § 645.

[1] Fry *v.* Lexington, etc., R. R. Co., 2 Metc. (Ky.) 314, 322; Winter *v.* Muscogee R. R., 11 Ga. 438; Gifford *v.* New Jersey R. R. Co., 10 N. J. Eq. 171; Board of Supervisors *v.* Mississippi, etc., R. R. Co., 21 Ill. 338; Chicago Life Ins. Co. *v.* Needles, 113 U. S. 574; Agricultural, etc., R. R. Co. *v.* Winchester, 13 Allen (Mass.) 29; Rutland, etc., R. R. Co. *v.* Thrall, 35 Vt. 536; Cross *v.* Peach Bottom Ry. Co., 90 Pa. St. 392; Poughkeepsie, etc., Co. *v.* Griffin, 24 N.Y. 150; Troy, etc., R. R. Co. *v.* Kerr, 17 Barb. (N. Y.) 581; Buffalo, etc., R. R. Co. *v.* Dudley, 14 N. Y. 336; 1 Beach Priv. Corp., §§ 41, 42; 1 Thomp. Corp., §§ 68, 72. *Contra*, Central R. R. Co. *v.* Collins, 40 Ga. 582, 617; Zabriskie *v.* Hackensack, etc., R. R. Co., 18 N. J. Eq. 178; 1 Morawetz Priv. Corp., § 403.

[2] Changing course and *termini* of railroad, Marietta, etc., R. R. Co. *v.* Elliott, 10 Ohio St. 57; Middlesex Turnp. Co. *v.* Locke, 8 Mass. 268; Witter *v.* Mississippi, etc., R. R. Co., 20 Ark. 463; Hester *v.* Memphis, etc., R. R. Co., 32 Miss. 378; Stevens *v.* Rutland, etc., R. R. Co., 29 Vt. 545; Manheim, etc., Co. *v.* Arndt, 31 Pa. St. 317. Consolidation, Botts *v.* Simpsonville, etc., Co., 88 Ky. 54, s. c. 2 L. R. A. 594; McCray *v.* Junction R. R. Co., 9 Ind. 358; Pearce *v.* Madison, etc., R. R. Co., 21 How. (U. S.) 441. Division into two corporations, Board of Supervisors *v.* Mississippi, etc., R. R. Co., 21 Ill. 338; Indiana, etc., Turnp. Co. *v.* Phillips, 2 Pen. & W. (Pa.) 184. Changing purpose. Hartford & N. H. R. R. Co. *v.* Croswell, 5 Hill (N. Y.) 383; Ashton *v.* Burbank, 2 Dill. (U. S.) 435. See, also, Mahan *v.* Wood, 44 Cal. 462; Thomas *v.* Railroad Co., 101 U. S. 71; Black *v.* Delaware, etc., Co., 24 N. J.

stockholders.[1] It is held in some cases that extensive changes may be made or accepted by the majority in the organization and objects of the corporation, provided they do not destroy its distinctive features or substitute an entirely different purpose;[2] but some of these cases, as is clearly demonstrated by Judge Thompson[3] and Mr. Morawetz,[4] are unsound in principle and contrary to the weight of authority. It is also said that the question of the materiality of an amendment must depend upon the peculiar facts and circumstances of the particular case;[5] but, while this is doubtless true to some extent, and in a limited sense, there must be some general rule by which the courts shall be guided, for the question is one of law for the court to determine.[6]

Eq. 455; Oldtown, etc., R. R. Co. *v.* Veazie, 39 Me. 571.

[1] Extending time for completion of road, Agricultural Branch R. R. Co. *v.* Winchester, 13 Allen (Mass.) 29; City of San Antonio *v.* Jones, 28 Tex. 19; Taggart *v.* Western R.R.Co., 24 Md. 563. Changing name of corporation, Buffalo, etc., R. R. Co. *v.* Dudley, 14 N.Y. 336; Bucksport, etc., R. R. Co. *v.* Buck, 68 Me. 81; Milwaukee, etc., R. R. Co. *v.* Field, 12 Wis. 340. Slight changes in the route or branch in some direction where the general interests of the corporation and the rights of the stockholders are not affected thereby, Peoria, etc., R. R. Co. *v.* Preston, 35 Iowa 115; Irwin *v.* Turnpike Co., 2 Pen. & W. (Pa.) 466; Fry *v.* Lexington, etc., R. R. Co., 2 Metc. (Ky.) 314, 323. See, also, Midland, etc., R. R. Co. *v.* Gordon, 16 Mees. & W. 804; Willson *v.* Wills Valley R. R. Co., 33 Ga. 466; Hazelett *v.* Butler University, 84 Ind. 230; leading article in 16 Am. Law Rev. 101, by W. H. Whitaker; and note in 53 Am. Dec. 465.

[2] Changes in the governing body and organization, Commonwealth *v.* Cullen, 13 Pa. St. 133, s. c. 53 Am. Dec. 450; Mower *v.* Staples, 32 Minn. 284. Changes in the purpose, and the like, Pacific R. R. Co. *v.* Hughes, 22 Mo. 291; Delaware R. R. Co. *v.* Tharp, 1 Houst. (Del.) 149, 174; Martin *v.* Pensacola, etc., R. R. Co., 8 Fla. 370; Pacific R. R. Co. *v.* Renshaw, 18 Mo. 210. Changes in route and *termini* of railroad, Banet *v.* Alton, etc., R. R. Co., 13 Ill. 504; Peoria, etc., R. R. Co. *v.* Elting, 17 Ill. 429; Ross *v.* Chicago, etc., R. R. Co., 77 Ill. 127. Consolidation, Sprague *v.* Illinois, etc., R. R. Co., 19 Ill. 174. Purchase of other roads, Venner *v.* Atchison, etc., R. R. Co., 28 Fed. R. 581. See, also, Greenville, etc., R. R. Co. *v.* Coleman, 5 Rich. L. 118; Worcester *v.* Norwich, etc., R. R. Co., 109 Mass. 103; Hanna *v.* Cincinnati, etc., R. R. Co., 20 Ind. 30; Willson *v.* Wills Valley R. R. Co., 33 Ga. 466; Rice *v.* Rock Island, etc., R. R. Co., 21 Ill. 93; Troy etc., R. R. Co., *v.* Kerr, 17 Barb. (N. Y.) 581.

[3] 1 Thomp. Corp., §§ 72, 73.

[4] 1 Morawetz Priv. Corp., § 402.

[5] Witter *v.* Mississipi, etc., R. R. Co., 20 Ark. 463.

[6] Memphis Branch R. R. Co. *v.* Sullivan, 57 Ga. 240; Witter *v.* Mississip-

§ 46. **Statutory provisions authorizing amendments.**—Provision is made in the various states for the amendment of the charters granted under the various general railroad acts, by the voluntary act of the corporation, when it is desirable to increase the amount of its capital stock, or the number of its directors, or to change its route, or termini.[1] But not every change in the fundamental law of a corporation is an amendment. Where the alteration by the legislature is very material, the act may be construed as the grant of a new charter, if such an intention appears on the part of the legislature, and by accepting it the company will be held to have surrendered its rights and contracts under the original charter.[2] The legislature has, in every state, a certain control over all corporations in the way of modifying the charters under which they operate, but where an attempted enlargement of corporate powers becomes indistinguishable from a granting of new substantive rights, a statute attempting to give such powers is within the purview of a constitutional amendment, prohibiting any pri-

pi, etc., R. R. Co., 20 Ark. 463. But see Southern Penna., etc., Co. *v.* Stevens, 87 Pa. St. 190.

[1] Stimson's Am. Stat. Law, § 8529. Where a charter is amended, under the Tennessee act, so as to change the starting point of a railroad, the change will not be effected unless such amendment is registered where the charter was originally required to be registered. Anderson *v.* Middle and East Tennessee Cent. R. Co., 91 Tenn. 44, 52 Am. & Eng. R. Cas. 149, 17 S. W. R. 803.

[2] Snook *v.* Improvement Co., 83 Ga. 61, 38 Am. & Eng. R. Cas. 492, 9 S. E. R. 1104. This was a case in which, after the incorporation of the A. & H. R. Co., under the general railroad law, the legislature passed an act entitled "An act to incorporate the A. & H. R. Co., to confer certain powers and privileges on said company, and for other purposes." The corporators named in the act were not altogether the same as those to whom the original charter was granted, and the act stated that "they are hereby created a body politic and corporate," and gave them all powers necessary to any railroad company. Afterwards an amendment to this act was passed, entitled "An act to amend the charter of the A. & H. R. Co., to change the name thereof, * * * to authorize the extension thereof, * * * and for other purposes." The last amendment gave the company a new name, and in the construction of the extension, all the powers granted by the act as first amended. The court held that these acts constituted a separate and distinct charter, creating a new corporation, and were not merely amendments to the original charter. Youngblood *v.* Improvement Co., 83 Ga. 797, s. c. 10 S. E. R. 124.

vate or local statute granting any exclusive privileges or franchises to a corporation.[1]

§ 47. **Forfeiture — Statutory provisions dispensing with judicial determination.**—Provision is made in many charters for their forfeiture upon failure of the corporation to comply with certain conditions imposed, as that it shall begin the construction of its road within a certain time, and complete the road and put it in operation before the expiration of a time limited.[2] Such provisions appear in all the general acts for the incorporation of railroads.[3] Under some of the statutes the forfeiture will take effect upon failure to comply with the conditions imposed,[4] without judicial determination,[5] and the franchises may be regranted by the legislature to another corporation.[6] But this, as we shall hereafter show, is not the

[1] Astor *v.* New York Arcade R. Co., 113 N. Y. 93, 22 N. Y. S. R. 1, 2 Law. R. Ann. 789; Braceville Coal Co. *v.* People, 147 Ill. 66, s. c. 22 L. R. A. 340.

[2] People *v.* New York Central Underground R. Co., 137 N. Y. 606. But such a provision does not apply to every sidetrack and switch which the company may find necessary or convenient to construct after the road is put in operation. It is sufficient if the main line is constructed and the road put in operation within the time limited. Town of Arcata *v.* Arcata, etc., R. R. Co., 92 Cal. 639.

[3] Stimson's Am. Stat. (1892), § 8528.

[4] A railroad company buying, at foreclosure sale, the franchise and property of another company whose road-bed is not completed, reorganizing under Laws N. Y., 1874, c. 430, which provide that such reorganization shall become and be vested with all the rights, privileges and franchises belonging to the corporation owning the property so sold, "and shall be subject to all the provisions, duties and liabilities imposed by the general railroad act and its amendments, except so far as * * * inconsistent herewith, and with the last named rights, privileges and franchises"; but failing to complete the railroad within the time limited by the general railroad act and amendments under which the company owning the property received its charter, may lose its charter at suit of the attorney-general, under code Civil Proc. N.Y., §1798, *et seq.* *In re* Attorney-general, 2 N.Y. Supp. 684, s. c. 50 Hun 511.

[5] Oakland R. Co. *v.* Oakland, etc., R. Co., 45 Cal. 365; Brooklyn Steam Tr. Co. *v.* Brooklyn, 78 N.Y. 524; Bywaters *v.* Paris, etc., R. Co., 73 Tex. 624. And this is so even though the construction of the projected road is actually begun within the time, by a lessee; *In re* Brooklyn, etc., R. Co., 72 N.Y. 245, 75 N. Y. 335, 19 Hun 314, 55 How. Pr. 14; Sulphur Springs, etc., R. Co. *v.* St. Louis, etc., R. Co., 2 Tex. Civ. App. 650. *Contra*, Citizens' Horse R. Co. *v.* City of Belleville, 47 Ill. App. 388.

[6] Oakland R. Co. *v.* Oakland, etc., R. Co., 45 Cal. 365; LaGrange, etc.,

general rule, in the absence of such a statute, for, unless otherwise provided, a mere cause of forfeiture is not *ipso facto* a forfeiture, but is simply ground for a judicial determination and declaration of forfeiture.[1] A condition to ensure the speedy construction of the road is for the benefit of the public, and a forfeiture for non-compliance with such condition can be enforced only by the public authorities. A stockholder can not take advantage of it,[2] nor can any advantage be taken of it in any collateral action.[3] Thus, it is held that such non-compliance can not be made available to defeat condemnation proceedings instituted by the company,[4] nor can a land owner take advantage of it in support of a suit to eject the company from land over which the road has been built.[5]

§ 48. Implied condition that corporate franchise is subject to forfeiture—Judicial determination—Causes for forfeiture.

R. Co. *v.* Rainey, 7 Coldw. (Tenn.) 420; Kennedy *v.* Strong, 14 Johns. (N. Y.) 128; *In re* Brooklyn, etc., R. Co., 72 N. Y. 245, 75 N. Y. 335, 19 Hun 314, 55 How. Pr. 14; Sturges *v.* Vanderbilt, 73 N. Y. 384; Brooklyn Steam Transit Co. *v.* City of Brooklyn, 78 N.Y. 524; State *v.* Clinton, etc., R. Co., 4 Rob. (La.) 445; United States *v.* Grundy, 3 Cranch (U. S.) 337, 351.

[1] Thus, in Brooklyn Steam Transit Co. *v.* City of Brooklyn, 78 N. Y. 524, 529, it is said: "The general principle is not disputed that a corporation, by omitting to perform a duty imposed by its charter, or to comply with its provisions, does not *ipso facto* lose its corporate character or cease to be a corporation, but simply exposes itself to the hazard of being deprived of its corporate character and franchises by the judgment of the court in an action instituted for that purpose by the attorney-general in behalf of the people; but it can not be denied that the legislature has the power to provide that a corporation may lose its corporate existence without the intervention of the courts by any omission of duty or violation of its charter, or default as to limitations imposed, and whether the legislature has intended so to provide in any case depends upon the construction of the language used."

[2] City of Antonio *v.* Jones, 28 Tex. 19. See, also, People *v.* Ulster, etc., R. R. Co., 128 N.Y. 240, s.c. 60 Am. & Eng. R. R. Cas. 558, and note; People *v.* North River Sugar Refining Co., 121 N. Y. 582, s. c. 32 Am. & Eng. Corp. Cas., 149; Hinchman *v.* Philadelphia, etc., Co., 160 Pa. St. 150, s. c. 28 Atl. R. 652.

[3] Hodges *v.* Baltimore U. P. R. Co., 58 Md. 603; *In re* Brooklyn El. R. Co., 125 N. Y. 434, 57 Hun 590. See, also, Central, etc., Road Co. *v.* People, 5 Colo. 39.

[4] *In re* Brooklyn El. R. Co., 125 N.Y. 434, 57 Hun 590.

[5] Cincinnati, etc., R. Co. *v.* Clifford, 113 Ind. 460; Bravard *v.* Cincinnati, etc., R. Co., 115 Ind. 1.

—Where no condition is expressed in the charter, there is, nevertheless, an implied condition annexed to every grant of corporate powers, that they shall be subject to forfeiture for willful misuser or non-user in regard to matters which go to the essence of the contract between the corporation and the state.[1] Such a forfeiture can, ordinarily, be declared only by decree of some competent judicial tribunal in proceedings instituted by the sovereign or its representative for that purpose.[2] To cause a forfeiture under the implied condition that the franchise shall be used for the purposes for which it was granted, there must be either an assumption of privileges not conferred by the charter,[3] a willful abuse of corporate powers, or an improper neglect to perform duties imposed.[4] Each duty assigned by the act of incorporation is held to be a condition an-

[1] Beach on Priv. Corp., § 45; Angell and Ames on Corp., § 774; Waterman on Corp., § 427; State *v.* Minnesota Cent. R. R. Co., 36 Minn. 246, s. c. 29 Am. & Eng. R. R. Cas. 440 and note; People *v.* Milk Exchange, 133 N. Y. 565, s. c. 30 N. E. R. 850; Edgar Collegiate Inst. *v.* Hardy, 142 Ill. 363, s. c. 32 N. E. R. 494; People *v.* Broadway R. R. Co., 126 N. Y. 29, s. c. 48 Am. & Eng. R. R. Cas. 692, and authorities there cited.

[2] Board, etc., *v.* Hall, 70 Ind. 469, 472; Hasselman *v.* U. S. Mortgage Co., 97 Ind. 365, 368; State *v.* Mississippi, etc., R. Co., 20 Ark. 495; Darnell *v.* State, 48 Ark. 321; Dyer *v.* Walker, 40 Pa. St. 157; Vermont, etc., R. Co. *v.* Vermont Cent. R.Co., 34 Vt. 1, 57; Chicago Life Ins. Co. *v.* Needles, 113 U. S. 574. Neither a stockholder, a corporate creditor nor one having a private controversy with the company can institute the suit. North *v.* State, *ex rel.*, 107 Ind. 356; Folger *v.* Columbian, etc., Ins. Co., 99 Mass. 267; Gaylord *v.* Fort Wayne, etc. R. Co., 6 Biss. (U. S.) 286; Moore *v.* Brooklyn, etc., R. Co., 108 N. Y. 98; Pickett *v.* Abney, 84 Tex. 645, s. c. 19 S.W. R. 859; West Jersey, etc., Co. *v.* Camden, etc., R. R. Co., (N. J.) 29 Atl. R. 333.

[3] People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358.

[4] People *v.* Kingston, etc., R. Co., 23 Wend. (N. Y.) 193; Attorney-General *v.* Erie, etc., Ry. Co., 55 Mich. 15, 22; Central, etc., R. R. Co. *v.* People, 5 Colo. 39, 46; Angell and Ames on Corp., § 776; note to State *v.* Atchison, etc., R. R. Co., 8 Am. St. R. 164, 183. Under Rev. St. Ohio, § 6789, a suit to oust a corporation from its franchise for misuser must be brought within five years from the date of commission of the offense. State *v.* Pittsburgh, etc., R. Co., 50 Ohio St. 239, 33 N. E. R. 1051. An allegation that the company intends at some time in the future to neglect the performance of its duties to the public, and does not in good faith intend to carry out the objects of the incorporation, is insufficient. State *v.* Martin, 51 Kan. 462, 60 Am. & Eng. R. R. Cas. 567; Commonwealth *v.* Pittsburgh, etc., R. R. Co., 58 Pa. St. 26.

nexed to the grant of the franchise conferred.[1] One such act or neglect may be sufficient to justify a forfeiture if tending to mischievous consequences;[2] but the ordinary rule is that acts, to have that effect, must be willful and repeated.[3] Slight deviations from the provisions of a charter, especially when arising from accident or mistake,[4] or from the unauthorized acts of the company's servants,[5] will not necessarily cause a forfeiture, unless the franchises are made to depend upon a strict and literal performance,[6] for a substantial performance of conditions imposed is all that is ordinarily required.[7] An abuse of one department of a franchise may, however, cause a forfeiture of the entire franchise.[8]

§ 49. **Grounds of forfeiture—Illustrative cases.**—Failure to run regular trains sufficient for the accommodation of the public,[9] even where the company possesses and continues to exercise other and secondary franchises,[10] and failure to keep its principal place of business within the state as required by statute,[11] have been held each to be a sufficient ground for enforc-

[1] People *v.* Kingston Turnpike R. Co., 23 Wend. (N. Y.) 193.

[2] Attorney-General *v.* Petersburg R. Co., 6 Ired. (N. C.) 456; People *v.* Bristol, etc., Co., 23 Wend. (N. Y.) 222, 245; Commercial Bank of Natchez *v.* State, 6 Smedes & M. 599, 623.

[3] Harris *v.* Mississippi Valley R. Co., 51 Miss. 602; State *v.* Pipher, 28 Kan. 127, 131; State *v.* Royalton, etc., Co., 11 Vt. 431. The mere failure to run trains for five days, not shown to have been willful or negligent, has been held insufficient cause for declaring a forfeiture. People *v.* Atlantic, etc., R. R. Co., 125 N. Y. 513, s. c. 48 Am. & Eng. R. R. Cas. 688.

[4] Angell and Ames on Corp., § 776.

[5] State *v.* Commercial Bank, 14 Miss. 218, 237.

[6] Eastern Archipelago Co. *v.* Regina, 2 Ellis & B. 856, 22 Eng. L. & Eq. 338, cited in Angell and Ames on Corp., § 776.

[7] People *v.* Thompson, 21 Wend. (N. Y.) 235; Thompson *v.* People, 23 Wend. (N. Y.) 537; Commonwealth *v.* Allegheny, etc., Co., 20 Pa. St. 185; Chicago City Ry. Co. *v.* People, *ex rel.*, 73 Ill. 541; State *v.* Wood, 84 Mo. 378.

[8] People *v.* Bristol, etc., T. Co., 23 Wend. (N. Y.) 222; People *v.* Kankakee, etc., Co., 103 Ill. 491.

[9] Silliman *v.* Fredericksburg, etc., R. Co., 27 Gratt. (Va.) 119; State *v.* Minnesota Central R. Co., 36 Minn. 246, s. c. 29 Am. & Eng. R. R. Cas. 440; People *v.* Albany, etc., R. Co., 24 N. Y. 261. See State *v.* Railway Co., 40 Ohio St. 504.

[10] State *v.* Minnesota Central R. Co., 36 Minn. 246. But see Wadesboro, etc., Co. *v.* Burns, 114 N. C. 353, 19 S. E. R. 238.

[11] State *v.* Park & Nelson Lumber Co., (Minn.) 10 Lewis Am. R. R. & Corp. R. 585; Simmons *v.* Norfolk, etc., Co., 113 N. C. 147, s. c. 18 S. E.

ing a forfeiture. The state need only prove that the act complained of is such as in the nature of things is calculated to cause injury. No actual injury need be shown.[1] Where a railroad corporation became insolvent thirteen years before, surrendered its property, suspended business, and permitted another corporation to carry on the business for which it was organized, its charter was properly declared forfeited.[2] So, where a corporation permitted its road to be sold on execution and broken up into two or more parts.[3] A mere colorable exercise of the corporate powers, as by the election of directors and the holding of occasional meetings, where the ordinary business of the corporation is relinquished, will bring the case within the meaning of a statute imposing a forfeiture for suspension of business.[4] So, where a railroad company takes up part of its track[5] or abandons or ceases to operate a part of its road,[6] or neglects to keep its road in such repair that it can be used,[7] or neglects to build part of its road and uses the rest

R. 117; State *v.* Milwaukee, etc., R. Co., 45 Wis. 579. And it is suggested that such failure is a breach of the duty of a corporation at common law, and would authorize a forfeiture in the absence of any statute on the subject. State *v.* Milwaukee, etc., R. Co., *supra;* People *v.* Kingston, etc., Co., 23 Wend. (N. Y.) 193. In this case it was shown that such action on the part of the corporation prevented the enforcement of an attachment against the shares of stockholders in an action brought in the courts of Wisconsin as provided by state laws. But it is held that a failure on the part of the principal officers to reside in the state and to keep the principal offices therein is not *per se* a forfeiture, and the franchises will only be forfeited for this cause upon *quo warranto* where it is shown that such action works an injury to the legal rights of the public or of individuals. See state *v.* Southern Pacific R. Co., 24 Tex. 80; North and South, etc., Co. *v.* People, 147 Ill. 234, s. c. 35 N. E. R. 608, 9 Lewis Am. R. R. & Corp. R. 1.

[1] Commercial Bank *v.* State, 6 Smedes & M. (Miss.) 599.

[2] People *v.* Northern R. Co., 53 Barb. (N. Y.) 98. See, also, Hart *v.* Boston, etc., R. Co., 40 Conn. 524, where it is held that the fact that it is an enforced suspension brought on by legal proceedings is no defense. But insolvency does not *ipso facto* work a forfeiture. Moran *v.* Lydecker, 27 Hun (N. Y.) 582; Bradt *v.* Benedict, 17 N. Y. 93; State *v.* Bailey, 16 Ind. 46, s. c. 79 Am. Dec. 405.

[3] State *v.* Rives, 5 Ired. (N. C.) 297, 309.

[4] *In re* Jackson, etc., Ins. Co., 4 Sanf. Ch. (N. Y.) 559.

[5] State *v.* West, etc., R. Co., 34 Wis. 197.

[6] People *v.* Albany, etc., R. Co., 24 N. Y. 261. But see *post*, § 51.

[7] State *v.* Madison, etc., R. Co., 72 Wis. 612, s. c. 36 Am. & Eng. R. R. Cas. 135; People *v.* Plymouth, etc.,

only in getting out coal from mines owned by those who control it,[1] or leases its road to another corporation without statutory authority,[2] or builds a line with other *termini* than those named in its charter and connects with a foreign railroad without authority of law,[3] it has been held that the state may enforce a forfeiture of the charter. And the sale of part of its road by a turnpike company to avoid the obligation to repair, has been held to be evidence of such willful non-user as authorized a decree of forfeiture.[4] Entering into an agreement with other corporations to destroy competition has been held a cause of forfeiture;[5] and such agreements on the part of competing lines of railroad are expressly forbidden in many of the states. Where the statute requires a certain amount of capital stock to be subscribed before the organization of a railroad corporation, the subscription must be made in good faith by those having a reasonable expectation of being able to pay for the stock subscribed, or the state may enforce a forfeiture.[6] And generally a failure to proceed in good faith to carry out the purposes of the organization, and complete the enterprise, will authorize a suit by the state for this purpose.[7] In Louisi-

Co., 32 Mich. 248; People *v.* Hillsdale, etc., Co., 23 Wend. (N. Y.) 254.

[1] State *v.* R. Co., 40 Ohio St. 504. Where the charter does not limit the time within which the road is to be constructed, a railroad may build its line long after the date of its charter, no forfeiture having been enforced against it. Western, etc., R. Co.'s Appeal, 104 Pa. St. 399.

[2] State, *ex rel.*, *v.* Atchison, etc., R. Co., 24 Neb. 143, s. c. 8 Am. St. R. 164.

[3] Commonwealth *v.* Franklin Canal Co., 21 Pa. St. 117.

[4] State *v.* Pawtuxet Turnpike Co., 8 R. I. 182.

[5] People *v.* North River Sugar Ref. 19 N. Y. St. R. 853, People *v.* Milk Exchange, 133 N. Y. 565, s. c. 30 N. E. R. 850. See, also, Chicago, M. & St. P. Ry. Co. *v.* Wabash, etc., Ry. Co., 61 Fed. R. 993, s. c. 10 Lewis' Am. R. R. & Corp. R. 173, and note; Cleveland, etc., R. R. Co. *v.* Closser, 126 Ind. 348, s. c. 3 Lewis' Am. R. R. & Corp. R. 686. But see United States *v.* Knight & Co., 156 U. S. 1, 15 Supr. Ct. R. 249, s. c. 10 Lewis' Am. R. R. & Corp. R. 737; Oakdale, etc., Co. *v.* Garst, (R. I.) 28 Atl. R. 973, s. c. 10 Lewis' Am. R. R. & Corp. R. 184.

[6] The state is not concluded by the fact that the articles of association were filed after the requisite subscription was made, if it be shown that the subscribers were insolvent. Holman *v.* State, *ex rel.*, 105 Ind. 569.

[7] Cook on Stock and Stockholders, § 638; People *v.* New York, etc., Ry. Co., 137 N. Y. 606, s. c. 33 N. E. R. 744; People *v.* Ulster, etc., R. R. Co., 128 N. Y. 240; State *v.* Nonconnah, etc., Co., (Tenn.) 17 S. W. R. 128.

ana the issue of fictitious or "watered" stock is, by statute, made a cause for the forfeiture of the charter of a corporation;[1] and in Nebraska, where such issues are prohibited by the constitution,[2] a railroad corporation may be held to have forfeited its charter for this cause;[3] but this is not, ordinarily, a cause of forfeiture.[4]

§ 50. **When duty to declare forfeiture is mandatory and when discretionary.**—Where, in a proceeding by *quo warranto* on behalf of the state, a cause of forfeiture prescribed by statute is clearly shown to exist, it is mandatory upon the court to declare the forfeiture,[5] and it has no discretion to refuse judgment upon the ground that it would be against public interest.[6] But in all cases where the information is based only upon the implied condition that the corporation shall serve the purposes of its creation it is within the sound discretion of the court whether or not it will pronounce judgment of ouster against a corporation which has misused or abused its franchises, and it will generally refuse to do so if, in its judgment, the interests of the public do not require a forfeiture.[7]

§ 51. **What is not cause for forfeiture.**—A mere intention to violate its duty,[8] or to fail to build its road[9] will not authorize a forfeiture, even though it might authorize an injunction.[10]

[1] Stimson's Am. Stat. Law, (1886) § 452.

[2] Const. Neb., art. 11, § 5.

[3] State, *ex rel.*, *v.* Atchison, etc., R. Co., 24 Neb. 143, s. c. 8 Am. St. R. 164.

[4] State *v.* Minn., etc., R. Co., 40 Minn. 213, 41 N. W. R. 1020; Commonwealth *v.* Cent. Pass. Ry. Co., 52 Pa. St. 506. *Post*, § 51.

[5] State *v.* Minnesota Cent. R. Co., 36 Minn. 246, 29 Am. & Eng. R. R. Cas. 440; State *v.* Oberlin, etc., Ass'n, 35 Ohio St. 258; People *v.* Fishkill, etc., Co., 27 Barb. (N. Y.) 445; People *v.* Northern R. R., 53 Barb. (N. Y) 98; State *v.* Real Estate Bank, 5 Ark. 595, s. c. 41 Am. Dec. 109.

[6] State *v.* Pennsylvania, etc., Co., 23 Ohio St. 121.

[7] State *v.* People's Mut. Benefit Ass'n, 42 Ohio St. 579; State *v.* Crawfordsville, etc., Co., 102 Ind. 283, 289. See, also, People *v.* North Chicago Ry. Co., 88 Ill. 537.

[8] Commonwealth *v.* Pittsburg, etc., R. Co., 58 Pa. St. 26, 45; State *v.* Martin, 51 Kan. 462, 60 Am. & Eng. R. R. Cas. 567.

[9] State *v.* Kingan, 51 Ind. 142; State *v.* Beck, 81 Ind. 500.

[10] See note to Ottaquechee Wollen Co. *v.* Newton, 57 Vt. 451, by H. C. Black, 21 Cent. L. J. 432, 435.

And it is said that there must be a violation of the spirit as well as the letter of the law before such a decree is justifiable.[1] The intent is sometimes considered in deciding whether the charter has been violated. Where the charter was made liable to forfeiture for non-user for two years, the court decided that a forfeiture was not incurred by the failure of a railroad corporation to begin building its line until three years from the date of its charter, where that time had been devoted to efforts to raise the necessary funds.[2] And the holding of a meeting of the corporators of a company to which all the stock had been subscribed, at which the charter was accepted, officers elected, and contracts for building the road were authorized, was held to put the charter in operation within the meaning of the provision of the Illinois constitution[3] abrogating all charters not in operation.[4] Acceptance of a charter, paying an enrollment tax and bonus to the state, the election of officers, appointment of committees, and the expenditure of large sums of money in the purchase of mineral rights, and in surveying, grading, and constructing a railroad, were held sufficient in a recent case to exempt a railroad and mining company from the operation of the section of the Pennsylvania constitution,[5] which provides that the charters of all such corporations as have not commenced business in good faith, prior to a certain date, shall be forfeited,[6] and the court also said that: "A mere temporary suspension of the business of a railroad company for a year, the business being afterwards resumed and continued without interruption, is not such non-user of its franchise

[1] Thompson *v.* People, 23 Wend. (N. Y.) 537, 585.

[2] Young *v.* Webster City, etc., R. Co., 75 Iowa 140. Under the New York code, which allows an action in equity for the forfeiture of the charter of a corporation, "where it has suspended its ordinary and lawful business for at least one year," it is no ground for maintaining such action that a railroad company has omitted for five days to run its trains. People *v.* Atlantic Ave. R. Co., 125 N. Y. 513, affirming, 57 Hun 378. See, also, State *v.* Consolidation Coal Co., 46 Md. 1, 14.

[3] Illinois Const., 1870, Art. XI.

[4] McCartney *v.* Chicago. etc., R. Co., 112 Ill. 611.

[5] Const. Pa., Art. XVI, Sec. 1.

[6] Commonwealth *v.* New York, L. E. & W. Coal & Railroad Co., (Pa. Com. Pl.) 10 Pa. Co. Ct. R. 129.

as will operate as a forfeiture of its charter."[1] The omission of a railroad company for five days to run its trains has been held not to be an "abuse of its powers," within the meaning of a statute,[2] which authorizes an action for dissolution for abuse of corporate powers.[3] The mere failure to observe some of the preliminary requirements, as a failure to file a map of the proposed route with the secretary of state within a certain time,[4] or the payment of one-half of the capital stock in property whose value exceeds one-half of the par value of the stock where the statute requires such half to be paid in lawful money of the United States,[5] will not work a forfeiture; nor will any specific act of *non feasance*, unintentionally but negligently committed, where it does not have a mischievous tendency.[6] Building the road across lands over which the company has not obtained the right of way is not a sufficient misuser to cause a forfeiture.[7] Neither an unauthorized attempt to change the corporate name,[8] nor the use of an abbreviation instead of proper name,[9] is sufficient ground for *quo warranto* proceedings. Failure to run regular passenger trains, where, by reason of the construction and operation of a horse railroad, the income from such trains would not pay for the expense of operating them is not a cause of forfeiture, it appearing that the company

[1] Commonwealth *v.* New York, L. E. & W. Coal & Railroad Co., (Pa. Com. Pl.) 10 Pa. Co. Ct. R. 129.

[2] Code Civil Proc., N.Y., § 1798.

[3] People *v.* Atlantic Ave. R. Co., 125 N. Y. 513, affirming, 57 Hun. 378.

[4] Harris *v.* Mississippi Valley, etc., R. Co., 51 Miss. 602. See Eastern Archipelago Co. *v.* Regina, 22 Eng. L. & Eq. 228, cited in An. & Ames, § 776, to the effect that slight deviations from the provisions of the charter are not necessarily either an abuse or a misuse of it. But see People *v.* Montecito Water Co., 97 Cal. 276, s. c. 32 Pac. R. 236.

[5] State *v.* Wood, 84 Mo. 378. The soundness of this decision, however, is questionable.

[6] Angell & Ames, on Corporations, § 776, note 1. See, also, People *v.* Jackson P. R. Co., 9 Mich. 285; State *v.* Royalton, etc., T. Co., 11 Vt. 431; People *v.* Hillsdale T. Co., 23 Wend. 254.

[7] See State, *ex rel.*, *v.* Kill Buck, etc., Co., 38 Ind. 71; People *v.* Hillsdale, etc., Co., 2 Johns. (N.Y.) 190.

[8] O'Donnell *v.* Johns & Co., 76 Tex. 362, s. c. 13 S.W. R. 376. As to effect of unauthorized change of name, see Cincinnati Cooperage Co. *v.* Bate, (Ky.) 26 S.W. R. 538, s. c. 10 Lewis' Am. R. R. & Corp. R. 653, and note.

[9] People *v.* Bogart, 45 Cal. 73.

is regularly engaged in the transportation of freight traffic over its road, and has carried all passengers who have sought passage;[1] nor is the obtaining of a charter from another state for a similar purpose[2] and bringing a suit in the federal court to test the constitutionality of a statute of its own state incorporating another company a cause of forfeiture;[3] nor forming an unauthorized agreement of consolidation with another corporation;[4] nor issuing stock below par where no interests are injuriously affected thereby.[5] And it has been held that *quo warranto* will not lie to prevent the use of a portion of a railroad which has been completed, merely because the project for building other portions authorized by the charter has been abandoned.[6]

§ 52. **Waiver of forfeiture — Collateral proceedings.**—No advantage can be taken in any collateral proceeding, of a forfeiture which has not been judicially established;[7] and the state may waive any breach involving a forfeiture of charter

[1] Commonwealth *v.* Fitchburg R. Co., 12 Gray, (Mass.) 180.

[2] Commonwealth *v.* Pittsburg, etc., R. Co., 58 Pa. St. 26.

[3] Commonwealth *v.* Pittsburgh, etc., R. Co., 58 Pa. St. 26. The court, per Sharswood, J., intimates that the case might be different if the suit were brought in the courts of a foreign sovereignty, but holds that the federal courts form a part of the courts of each state, administering the law as construed by its own tribunals.

[4] State, *ex rel.*, *v.* Crawfordsville, etc., Co., 102 Ind. 283; Crawfordsville, etc., Co. *v.* State, *ex rel.*, 102 Ind. 435. It is held otherwise, however, where the consolidation is expressly prohibited. State *v.* Atchison, etc., R. R. Co., 24 Neb. 143, s. c. 8 Am. St. R. 164.

[5] Howe *v.* Deuel, 43 Barb. (N. Y.) 504; Hastings *v.* Amherst, etc., R. Co., 9 Cush. (Mass.) 596; State *v.* Minnesota, etc., Co., 40 Minn. 213, 41 N. W. R. 1020.

[6] Attorney-gen. *v.* Birmingham Junction R. Co., 8 Eng. L. & Eq. 243. But see, *ante*, § 49. A sale of all the corporate property does not necessarily work a forfeiture of the corporate franchises, and where it is necessary for the protection of the interests of stockholders or third persons, a corporation which has disposed of all its property will be held to be still in existence. Langhorne *v.* Richmond City R. Co., (Va.) 19 S. E. R. 122; Price *v.* Holcomb, (Iowa) 56 N. W. 407.

[7] Cincinnati, etc., R. *v.* Clifford, 113 Ind. 460; New York, etc., R. Co. *v.* New York, etc., R. Co., 52 Conn. 274; Danbury, etc., R. Co. *v.* Wilson, 22 Conn. 435, 449; Cleveland, etc., R. Co. *v.* Erie, 27 Pa. St. 380; Hodges *v.* Baltimore, etc., R. Co., 58 Md. 603.

rights,[1] by implication as well[2] as by express legislative enactment.[3] A waiver will not, however, revive a corporation after it has ceased to exist, where the constitution prohibits the granting of special charters,[4] though, possibly, a general act for the remission of all forfeitures incurred under the terms of the incorporating act would be valid.[5] It has been held that the passage of an act providing for the issue of bonds to be paid long after a forfeiture would, by the terms of the charter, have accrued, is a waiver of such forfeiture, and a repeal by implication of the clause in the charter providing for it.[6] So a legislative recognition of a *de facto* corporation *after* an accrued forfeiture has become known may constitute a waiver,[7] as well as a long-continued neglect on the part of the judicial department to enforce the forfeiture.[8] But where there has been no attempt to legally organize a corporation, no lapse of time confers any rights,[9] and where, according to the terms of

[1] Hinchman *v.* Philadelphia, etc., R. R. Co., 160 Pa. St. 150, s. c. 28 Atl. R. 652; State *v.* Bergen, etc., Ry. Co., 53 N. J. L. 108, 20 Atl. R. 762; Farnsworth *v.* Lime, etc., R. R. Co., 83 Me. 440, 22 Atl. R. 373; People *v.* Ulster, etc., R. R. Co., 128 N. Y. 240; Beach on Priv. Corp., § 59; Cook on Stock and Stockholders, § 636.

[2] Matter of Petition of New York El. R. Co., 70 N. Y. 327; Foster *v.* Pitch, 36 Conn. 236.

[3] Such a statute may revive and keep in force the original act of incorporation, and continue the existence of the corporation as it was before the forfeiture. Phillips *v.* Town of Albany, 28 Wis. 340.

[4] Oroville, etc., R. Co. *v.* Supervisors of Plumas Co., 37 Cal. 354; *In re* Brooklyn, etc., R. Co., 72 N. Y. 245, 75 N. Y. 335, 19 Hun 314, 55 How. Pr. 14.

[5] See State of Maryland *v.* Baltimore, etc., R. Co., 3 How. (U. S.) 534; Wilson *v.* Ohio, etc., R. Co., 64 Ill. 542, 16 Am. Rep. 565; Chicago, etc., R. Co. *v.* Adler, 56 Ill. 344.

[6] Foster *v.* Pitch, 36 Conn. 236.

[7] *In re* New York E. R. Co., 70 N. Y. 327; Briggs *v.* Cape Cod Ship Canal Co., 137 Mass. 71; Baltimore, etc., R. Co. *v.* Marshall Co., 3 W. Va. 319; Central & Georgetown R. Co. *v.* People, 5 Colo. 39; Chesapeake, etc., Canal Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. (Md.) 1; Enfield Bridge Co. *v.* Connecticut River Co., 7 Conn. 28; People *v.* Ottawa Hydraulic Co., 115 Ill. 281; La Grange, etc., R. Co. *v.* Rainey, 7 Coldw. (Tenn.) 420, empowering another company to buy the franchises of a railroad company is a waiver of accrued forfeiture for non-user of such franchises, and the new company takes by its purchase a right to complete and operate the purchased road under its original franchise. Hinchman *v.* Philadelphia, etc., R. Co., 160 Pa. St. 150.

[8] State *v.* Crawfordsville, etc., Turnpike Co., 102 Ind. 283; People *v.* Oakland County Bank, 1 Dougl. (Mich.) 282; People *v.* Williamsburg, etc., Co., 47 N. Y. 586.

[9] People *v.* Stanford, 77 Cal. 360.

the charter, the franchise has been absolutely forfeited by failure to perform certain conditions, mere subsequent recognition by the legislature will not waive the forfeiture.[1] Providing penalties for the acts which, by the terms of the charter would constitute a forfeiture, has been held to be a waiver,[2] but it is said that where there is a statute[3] which makes it the duty of the attorney-general, unless otherwise expressly directed by law, to seek the forfeiture of the charter of the corporation which has, by any act or omission, misuser or non-user, forfeited the same, the right of the state to demand a forfeiture of the charter of a railroad company which has sold its road and franchises to a foreign company in violation of the constitution, failed to keep up its organization, and allowed its road to become unsafe, is not waived by the provisions of a subsequent statute,[4] providing for *quo warranto* against a corporation carrying on business in violation of a constitutional provision[5] forbidding sale to or consolidation with a competing or foreign company, to enforce the penalties therefor, together with an injunction against future violation, and the appointment of a receiver.[6]

§ 53. **Proceedings to forfeit—Quo warranto—Parties.**—At common law it was held that a forfeiture of charter franchises should be enforced by *scire facias*,[7] while *quo warranto* was

Where the incorporation is merely irregular, a legislative recognition is equivalent to a charter. McAuley *v.* Columbus, etc., R. Co., 83 Ill. 348; Atlantic, etc., R. Co. *v.* St. Louis, 66 Mo. 228; Mead *v.* New York, etc., R. R. Co., 45 Conn. 199; Cowell *v.* Colorado, etc., Co., 3 Colo. 82; Kanawha, etc., Co. *v.* Kanawha, etc., Co , 7 Blatch. (U. S.) 391.

[1] State *v.* Fourth, etc., Turnp. Co., 15 N. H. 162.

[2] State *v.* Morris, 73 Tex. 435; Washington, etc., R. Co. *v.* State, 19 Md. 239; State *v.* Real Estate Bank, 5 Ark. 595, s. c. 41 Am. Dec. 109; Commonwealth *v.* Breed, 4 Pick. (Mass.) 460); Baker *v.* Backus, 32 Ill. 79. But see Commercial Bank of Natchez *v.* State, 6 Smedes & M. (Miss.) 599; State Bank *v.* State, 1 Blackf. (Ind.) 267.

[3] Rev. Stat. Tex., art. 2805.

[4] Sayles Civil Stat., art. 4247a, § 2.

[5] Cons. Tex., Art. X, §§ 5, 6.

[6] East Line & R. R. R. Co. *v.* State, 75 Tex. 434, 12 S. W. R. 690.

[7] Rex *v.* Pasmore, 3 T. R. 199, 244; Ames *v.* Kansas, 111 U. S. 449; Regents of University *v.* Williams, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72, 111; State *v.* St. Paul, etc., R. Co., 35 Minn. 222.

the proper means of inquiring into an unauthorized assumption of corporate powers.[1] But the latter writ, or, in modern practice, an information in the nature of a *quo warranto*, may be used for the trial of abuse of powers as well as for inquiring into the usurpation of franchises.[2] When *quo warranto* is employed for the purpose of ousting individuals who have unlawfully usurped the franchise to be a corporation, it is generally held that it should be directed against the individuals assuming to act as a corporation,[3] for "a corporation," it is said, "can not be brought into court to answer the allegation that it is not and never was a corporation;"[4] and bringing a suit against the company by its assumed corporate name is held in many jurisdictions to be an admission of its existence as a corporation.[5] Moreover, it is said that the incorporators should have their day in court, in the event that they do not consti-

[1] Authorities cited in last note, *supra*.

[2] People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358, 386, 395; People *v.* Trustees of Geneva College, 5 Wend. (N. Y.) 211; Chesapeake, etc., Co. *v.* Baltimore, etc., R. Co., 4 Gill & J. (Md.) 1, 121; State *v.* Milwaukee, etc., R. Co., 45 Wis. 579; State *v.* Boston, etc., R. Co., 25 Vt. 433; National Docks R. Co. *v.* Central R. Co., 5 Stewart (N. J.) 755; Bruffett *v.* Great Western R. Co., 25 Ill. 353; People *v.* Jackson, etc., R. Co., 9 Mich. 285; note to State *v.* Atchison, etc., R. R. Co., 8 Am. St. R. 164,198; High on Extraordinary Rem., § 647.

[3] Wolfe *v.* Underwood, 97 Ala. 375; Mud Creek, etc., Co. *v.* State, 43 Ind. 236; Chesshire *v.* People, *ex rel.*, 116 Ill. 493, s. c. 6 N. E. R. 487; People *v.* Rensselaer, etc., R. Co., 15 Wend. (N. Y.) 113, 30 Am. Dec. 33; State *v.* Cincinnati, etc., Co., 18 Ohio St. 262; Commonwealth *v.* Central Passenger R. Co., 52 Pa. St. 506; People *v.* Stanford, 77 Cal. 360.

[4] Mud Creek, etc., Co. *v.* State, 43 Ind. 236; Chesshire *v.* People, 116 Ill. 493, s. c. 6 N. E. R. 487.

[5] People *v.* Stanford, 77 Cal. 300; Commercial Bank of Natchez *v.* State, 6 Smedes & M. (Miss.) 599, 614; People *v.* Rensselaer, etc., R. Co., 15 Wend. (N. Y.) 113, s. c. 30 Am. Dec. 33, 38; State *v.* Cincinnati Gas Light, etc., Co., 18 Ohio St. 262. *Contra*. People *v.* Bank of Hudson, 6 Cow. (N. Y.) 217. In the note to State *v.* Atchison, etc., R. Co., 8 Am. St. R. 164, 199, it is said that "this rule rests upon no sound reason," and it does seem like sacrificing the spirit to the letter, for, where it clearly appears from the information that its purpose is to challenge the legal existence of the corporation, or, in other words, the right of the incorporators to be a corporation, it is very technical to hold that the use of the corporate name is an admission of the corporate existence. It is more in consonance with the spirit of such proceedings, although it may not be entirely logical, to treat the name as descriptive and the information as calling

tute a legal person capable of appearing and answering.[1] But the proceedings should be against the corporation itself, where the purpose is to enforce a forfeiture of its charter, incurred by misuse or abuse of its powers, or to oust it from the exercise of unwarranted rights and privileges under its charter.[2]

§ 54. **Proceedings must generally be in court of law—Statutory provisions.**—A proceeding to enforce a forfeiture or to deprive a *de facto* corporation of its usurped privileges must be brought in a court of law,[3] a court of equity having no jurisdiction in such cases unless it is conferred by statute.[4] In many of the states special provisions are made by statute

upon the individuals to answer by what authority they use that name and exercise the rights of a corporation.

[1] State *v.* Independent School District, 44 Iowa 227; King *v.* City of London, Skin. 293, 310.

[2] State *v.* Atchison, etc., R. Co., 24 Neb. 143, 32 A. & E. R. Cas. 388; People *v.* Bank of Niagara, 6 Cowen (N. Y.) 196; People *v.* New York Cent. Underground R. Co., 137 N. Y. 606, 66 Hun 633; State *v.* Taylor, 25 Ohio St. 279; Smith *v.* State, 21 Ark. 294. Mr. Spelling states the rule as follows: "When the purpose is to suppress a usurpation of corporate franchises by individuals, the information should name and proceed against the defendants as individuals, * * * but when the purpose is to enforce a forfeiture of corporate franchises usurped by a corporation the proceeding should be against the incorporated body in its corporate name. The rule is different, however, when the proceeding is based upon a forfeiture which a corporation once legally formed is alleged to have incurred. In that case it is properly filed against the corporate body, not the individual members." 2 Spelling Extraord. Relief, § 1843. See, also, State *v.* Barron, 57 N. H. 498; People *v.* Rensselaer, etc., R. Co., 15 Wend. (N. Y.) 113, s. c. 30 Am. Dec. 33, and note; also article in 40 Alb. L. J. 10.

[3] Attorney-general *v.* Stevens, 1 N. J. Eq. 369, 22 Am. Dec. 526; President, etc., *v.* Trenton Bridge Co., 13 N. J. Eq. 46; King *v.* Clarke, 1 East. 38, 43; Attorney-general *v.* Utica Ins. Co., 2 Johns. Ch. 371. Whether a corporation has been guilty of acts or omissions sufficient to constitute cause for forfeiture is generally a judicial and not a legislative question. Cooley's Const Lim. *106; Vermont, etc., R. Co. *v.* Vermont Cent. R. Co., 34 Vt. 2; Regents *v.* Williams, 9 G. & J. (Md.) 365, s. c. 31 Am. Dec. 72; Mayor *v.* Pittsburgh, etc., R. Co., 2 Abb. U. S. 9. See *post*, §§ 57, 58.

[4] Belmont *v.* Erie R. Co., 52 Barb. 637; Bayless *v.* Orne, 1 Freem. Ch. (Miss.) 161; State *v.* Merchants' Ins., etc., Co., 8 Humph. (Tenn.) 234; Western Pa. R. Co.'s Appeal, 104 Pa. St. 399; Folger *v.* Columbian Ins. Co., 99 Mass. 267, 96 Am. Dec. 747. See Heap *v.* Heap Manufacturing Co., 97 Mich. 147; note to State *v.* Atchison, etc., R. Co., 8 Am. St. R. 164, 200; 2 Morawetz Corp., § 1040.

for the prosecution of suits of this nature in certain specified courts.[1] The state may delegate the right to bring the action in its name,[2] but it may not authorize any person to declare a forfeiture without first obtaining the judgment of a court.[3]

§ 55. Collateral proceedings—Pleadings and judgment in forfeiture proceedings.—No private individual can maintain a suit to enforce the forfeiture of a charter, unless specially authorized by the state to do so, nor can a mere ground or cause for forfeiture be successfully used by him as part of his cause of action in a collateral proceeding,[4] nor can acts amount-

[1] In our own country writs or informations in the nature of writs of *quo warranto* are filed in the highest courts of ordinary jurisdiction in several of the states, either by the attorney-general or the prosecutor. Angell & Ames, § 733, citing 4 Cowen (N. Y.) 102, n. a.; People *v.* Richardson, 4 Cowen, 97, 102, n.; Commonwealth *v.* Fowler, 10 Mass. 290; Respublica *v.* Griffiths, 2 Dall. (Pa.) 112; State *v.* Foster, 2 Halst. (N. J.) 101; State *v.* Charleston, 1 Const. R. (Treadway, S. C.) 36; State *v.* Merry, 3 Mo. 278. See Denike *v.* New York, etc., Co., 80 N. Y. 599. In California, this jurisdiction lies in the district courts. In Indiana an information may be filed in the circuit court by the prosecuting attorney, or by any person claiming an interest in the corporation which has abused its powers. R. S. 1894, §§ 1145, 1146; Board *v.* Hall, 70 Ind. 469; Danville, etc., Co. *v.* State, *ex rel.*, 16 Ind. 456. In New York, Tennessee, and Colorado, the remedy is by civil action under the several codes, N. Y. Code, 1884, § 1983; People *v.* Cook, 8 N. Y. (4 Selden) 67; State, *ex rel.*, *v.* Turk, Mart. & Yerg. (Tenn.) 287; Attorney-general *v.* Leaf, 9 Humph. (Tenn.) 753; Code of Tenn., § 3409, *et seq.*; Central, etc., R. Co. *v.* People, 5 Colo. 39; Atchison, etc., R. R. Co. *v.* People, 5 Colo. 60, cited in Waterman on Corp., § 380. In Minnesota and Maryland, the proceeding is by complaint filed by the attorney-general in the district court of the proper county. 2 Stimson's Am. Stat. 177. A forfeiture of corporate franchises granted by a city can be enforced only by a direct proceeding by *quo warranto* under the statutes. Citizens' Horse R. Co. *v.* City of Belleville, 47 Ill. App. 388.

[2] State, *ex rel.*, *v.* Smith, 32 Ind. 213; State, *ex rel.*, *v.* Ireland, 130 Ind. 77; Western Pa. R. Co.'s Appeal, 104 Pa. St. 399. Where the common law rule has not been changed by statute suit must be brought by the attorney-general on behalf of the state. Heap *v.* Heap Co., 97 Mich. 147; Bass *v.* Roanoke, etc., Co., 111 N. C. 439; State *v.* International Co., 35 S. W. 1067.

[3] A statute authorizing the secretary of state to declare the charter of a corporation forfeited if its taxes are not paid is invalid. Forfeiture can be made only after suit brought by the state for that purpose. Greenbrier, etc., Co. *v.* Ward, 36 W. Va. 573, 15 S. E. 89.

[4] North *v.* State, 107 Ind. 356; State *v.* Rio Grande R. Co., 41 Tex. 217. Injunction will not lie at the suit of a private person, to enforce the

ing to a forfeiture be set up by plea or answer in any collateral action.[1] Proceedings to declare a forfeiture must be instituted in the state or country in which the corporation is created.[2] The information should, in most states, set forth specifically the facts upon which the claim of forfeiture of corporate rights is founded.[3] A judgment recovered against a corporation pending an appeal from a judgment forfeiting its franchises will, where an appeal suspends the judgment of the trial court, bind the property of the corporation, although the judgment appealed from is afterward affirmed.[4] But, after dissolution, the general rule is that no judgment can be entered against the corporation even in a suit which was pending at the time of the dissolution.[5]

§ 56. **Repeal of charter — Reserved power.** — Where the state, either by constitutional provision,[6] by general stat-

forfeiture of a charter granted to a corporation for public purposes. Hinchman *v.* Philadelphia, etc., R. Co., 160 Pa. St. 150; Twelfth St. Market Co. *v.* Philadelphia, etc., R. Co., 142 Pa. St. 580, s. c. 21 Atl. R. 902.

[1] Logan *v.* Vernon, etc., R. Co., 90 Ind. 552; Union Branch R. Co. *v.* East Tenn., etc., Co., 14 Ga. 327; Thompson *v.* New York, etc., R. Co., 3 Sand. Ch. (N. Y.) 625; Matter of N. Y. El. R. Co., 70 N. Y. 327; Connecticut, etc., R. Co. *v.* Bailey, 24 Vt. 465; Hammett *v.* Little Rock, etc., Co., 20 Ark. 204; La Grange, etc., R. Co. *v.* Rainey, 7 Coldw. (Tenn.) 420. See Bass *v.* Roanoke Nav., etc., Co., 111 N. C. 439.

[2] Carey *v.* Cincinnati, etc., R. Co., 5 Iowa 357, 367; Society *v.* Town of New Haven, 8 Wheat. (U. S.) 464; Importing, etc., Co. *v.* Locke, 50 Ala. 332.

[3] State *v.* Southern Pac. R. Co., 24 Tex. 80. The state must charge and prove the abuse or misuser of its franchises relied on as ground of forfeiture. State, *ex rel.* Walker, *v.* Talbot, (Mo. Sup.) 27 S. W. 366. A full treatment of the pleadings and practice in such proceedings will be found in the note to People *v.* Rensselaer, etc., R. Co., 30 Am. Dec. 33, 49–53.

[4] Texas Trunk R. Co. *v.* Jackson, 85 Tex. 605; Giles *v.* Stanton, 86 Tex. 620; Giles *v.* East Line, etc., R. Co., (Tex. Civ. App.) 26 S. W. 1111.

[5] First Nat. Bank *v.* Colby, 21 Wall. (U. S.) 609; Thornton *v.* Marginal, etc., Railway, 123 Mass. 32; Terry *v.* Merchants', etc., Bank, 66 Ga. 177; Saltmarsh *v.* Planters', etc., Bank, 17 Ala. 761. As to form of judgment of forfeiture, see Slee *v.* Bloom, 5 Johns. Ch. (N.Y.) 366; People *v.* Rensselaer, etc., R. Co., 15 Wend. (N. Y.) 113, s. c. 30 Am.Dec. 33, and note.

[6] See note 2, *supra*, title, Amendment of Charter. Chesapeake & O. Ry. Co. *v.* Miller, 114 U. S. 176, s. c. 5 Sup. Ct. R. 813. When the constitution of a state forbids the granting of irrevocable charters, this provision becomes a part of all charters granted, and under them subject to

ute,[1] or by special reservation introduced into the creative act, reserves the power to alter, amend or repeal the charter of a corporation, such charter is held not to constitute a contract between the state and the incorporators within the meaning of the federal constitution;[2] though in the absence of such reservation, the charter can not be taken away excepting for acts of the corporation amounting to a forfeiture.[3] Where an unconditional reservation is made, the power to repeal may be exercised at the pleasure of the legislature,[4] and its exercise can not be reviewed by the courts, unless, possibly, where some principle of natural justice is violated.[5]

§ 57. **Repeal where conditional power is reserved.** — But where only a conditional power to repeal the charter upon a failure of the corporation to comply with certain conditions is reserved, although the power may be exercised at once upon such failure,[6] and although the presumption will be in favor

repeal, whether so expressed in the act of the legislature or not. Delaware, etc., R. Co. *v.* Tharp, 5 Harr. (Del.) 454.

[1] The right to alter and repeal may be reserved in a general statute so as to apply to charters subsequently granted. Thornton *v.* Marginal Freight Railway Co., 123 Mass. 32; State *v.* Brown, etc., Co., (R. I.) 17 L. R. A. 856. And an act reserving power to repeal or amend remains in force until expressly repealed. 1 Waterman on Corp., p. 535. But the legislature may enter into an irrepealable contract with a corporation, notwithstanding a previous legislature has reserved the power to alter or repeal the charter. New Jersey *v.* Yard, 95 U. S. 104.

[2] Zabriskie *v.* Hackensack, etc., R. R. Co., 18 N. J. Eq. 178, 185; Commonwealth *v.* Fayette Co. R. Co., 55 Pa. St. 452; Cross *v.* Peach Bottom R. Co., 90 Pa. St. 392; Pacific R. Co. *v.* Renshaw, 18 Mo. 210; Mowrey *v.* Indianapolis, etc., R. Co., 4 Biss. (U. S.) 78; West Wisconsin R. Co. *v.* Trempealeau County, 35 Wis. 257; Wagner Free Inst. *v.* Philadelphia, 132 Pa. St. 612, s. c. 19 Am. St. R. 613.

[3] Miller *v.* State, 15 Wall. (U. S.) 478; State *v.* Northern Cent. R. Co., 44 Md. 131, 164; Campbell *v.* Mississippi Union Bank, 6 How. (Miss.) 625, 653.

[4] Spring Valley Water-works *v.* Schottler, 110 U. S. 347; Thornton *v.* Marginal Freight R. Co., 123 Mass. 32; *In re* Elevated R. R. Co., 70 N. Y. 327, 351; Western N. C. R. Co. *v.* Rollins, 82 N. C. 523; Mobile, etc., R. Co. *v.* State, 29 Ala. 573; Mayor, etc., *v.* Pitts., etc., R. Co., 2 Abbott U. S. 9; Bruffett *v.* Great Western R. Co., 25 Ill. 353; Taylor on Priv. Corp., § 503; Angell and Ames on Corp., § 767.

[5] Lothrop *v.* Stedman, 13 Blatch. (U. S.) 134, 42 Conn. 583; Sala *v.* New Orleans, 2 Woods (U. S.) 188.

[6] Oakland R. Co. *v.* Oakland, etc., R. Co., 45 Cal. 365; Myrick *v.* Braw-

of the existence of the facts on which the validity of a repealing statute depends,[1] yet it has been held that the legislature is not the final judge as to whether such a failure has given it authority to repeal, and that its action may be set aside by the courts.[2] It seems to us, however, that the legislature, having the right to reserve the power to repeal unconditionally, may reserve the right to repeal conditionally with power to determine whether or not the condition exists, for it is a general rule that where the legislature is authorized to determine whether a state of facts exists authorizing the exercise of power, its judgment that such a state of facts does exist is conclusive.[3] As such repeal may be regarded as only a ready substitute for a forfeiture for abuse of corporate powers upon *quo warranto* proceedings,[4] it has been suggested that the corporation should have an opportunity to be heard in its own defense before some judicial tribunal,[5] and not subjected to an *ex parte* judgment pronounced by one of the parties to the contract,

ley, 33 Minn. 377; Miners' Bank *v.* United States, 1 Greene (Iowa) 553; Kennedy *v.* Strong, 14 Johns. (N. Y.) 128; New York, etc., R. Co. *v.* Boston, etc., R. Co., 36 Conn. 196. But see Flint, etc., Co. *v.* Woodhull, 25 Mich. 99.

[1] Erie, etc., R. Co. *v.* Casey, 26 Pa. St. 287; State *v.* Curran, 7 Eng. (Ark.) 321.

[2] Commonwealth *v.* Pittsburg, etc., R. Co., 58 Pa. St. 26; Erie, etc., R. Co. *v.* Casey, 26 Pa. St. 287. Some cases hold that by accepting a charter containing a reservation by the legislature of power to repeal, upon the happening of a contingency, the corporation is estopped to question the authority of the legislature to determine whether the contingency has happened, though the question would otherwise be one for judicial determination. Crease *v.* Babcock, 23 Pick. (Mass.) 334, s. c. 34 Am. Dec. 61; Carey *v.* Giles, 9 Ga. 253; Lothrop *v.* Stedman, 42 Conn. 583; Miners' Bank *v.* United States, 1 Greene (Iowa) 553; DeCamp *v.* Eveland, 19 Barb. (N. Y.) 81, cited in 1 Beach Private Corporations, § 39. This we regard as the better rule.

[3] Elliott's Gen. Practice, § 148, and authorities last above cited. See, also, the more recent Pennsylvania case of Wagner Free Inst. *v.* Philadelphia, 132 Pa. St. 612, s. c. 19 Am. St. R. 613.

[4] Legislative power to declare a forfeiture is cumulative to and not a substitute for a judicial proceeding by *quo warranto*, and such proceedings may be brought when the legislature has failed to exercise its repealing power. State *v.* Southern Pac. R. Co., 24 Tex. 80.

[5] Mayor of Baltimore *v.* Pittsburgh, etc., R. Co., 2 Abb. U. S. 9. See Vermont, etc., R. Co. *v.* Vermont, etc., R. Co., 34 Vt. 2.

which it is claimed has been violated.[1] But, since a judicial finding establishing the misuser or abuse of corporate powers would have the effect to dissolve the corporation, such a proceeding would render idle the reservation of the power of repeal.[2] This power is of value because it may be exercised when proceedings by *quo warranto* might not only prove ineffectual, but would involve risks, embarrassment and delay.[3] A legislative inquiry to ascertain if there has been a violation of its charter or any other default by a corporation chartered under a general statute reserving to the legislature the right to repeal charters of corporations of its class upon any such violation or default, has been held not to be a "judicial act," such as the legislature is prohibited from performing by the constitutions of many of the states.[4]

§ 58. **Rule where power to repeal is not reserved.**—Where the power to repeal has not been reserved a different rule applies. In such a case the charter can only be revoked for cause as established by the decree of a competent tribunal upon judicial inquiry,[5] and is not subject to legislative repeal for any alleged abuse of corporate franchises,[6] at least where the legislature is prohibited by the state constitution from exercising judicial powers.[7]

§ 59. **Effect of repeal.**—The legislature may not, under the guise of authority to repeal the charter, invalidate contracts and vested rights of third parties;[8] nor will any action on its

[1] Commonwealth *v.* Proprietors of New Bedford Bridge, 2 Gray (Mass.) 339; Taylor Private Corp., § 503

[2] Erie, etc., R. Co. *v.* Casey, 26 Pa. 287; Crease *v.* Babcock, 23 Pick. (Mass.) 334; Miners' Bank *v.* United States, 1 Greene (Iowa) 553.

[3] Erie, etc., R. Co. *v.* Casey, 26 Pa. St. 287.

[4] Crease *v.* Babcock, 23 Pick.(Mass.) 334, s. c. 34 Am. Dec. 61. But see *post*, § 58.

[5] *Ante*, §§ 54, 56.

[6] State *v.* Noyes, 47 Me. 189; Sturges *v.* Vanderbilt, 73 N. Y. 384; Brooklyn Cent. R. Co. *v.* Brooklyn City R. Co., 32 Barb. (N. Y.) 358; Commonwealth *v.* Pittsburg, etc., R. Co., 58 Pa. St. 26.

[7] Bruffett *v.* Great Western R. Co., 25 Ill. 353; University of Maryland *v.* Williams, 9 Gill & J. (Md.) 365. But see Crease *v.* Babcock, 23 Pick.(Mass.) 334, s. c. 34 Am. Dec. 61.

[8] Miller *v.* State, 15 Wall. (U. S.) 478; Railroad Co. *v.* Maine, 96 U.S. 499; City of Detroit *v.* Detroit Plank Road

part affect the ownership of personal and real property acquired by the corporation during its lawful existence, or of rights of contract or choses in action, so acquired, which do not in their nature depend upon the general powers conferred by the charter.[1] The rights of the share-holders of such a corporation to their interests in such property are not, as a rule, annihilated by such a repeal,[2] and where the legislature does not provide a special remedy, the courts may enforce those rights by the means within their power.[3] The repeal by the legislature of the charter of a corporation, however, destroys its ability to originate new transactions dependent on the power conferred by the charter, and leaves the incorporators with only such powers as may be exercised by unincorporated private persons under the general laws of the state.[4] But the legislature may charter a new corporation with authority to take so much of the property and franchises of the corporation whose charter is revoked as may be necessary to the public use, upon making compensation therefor;[5] and it has been held that the repeal of a corporation's charter vests in the state the right to all public works built by it for public use on lands taken in the name of the state (subject to the proprietary right of the share-holders to the assets), together with the right to manage them or regrant them at its election.[6]

Co., 43 Mich. 140; Albany, etc., R. Co. *v.* Brownell, 24 N. Y. 345; Commonwealth *v.* Essex Co., 13 Gray (Mass.) 239, 253. But see Macon, etc., R. R. Co. *v.* Gibson, 85 Ga. 1, s. c. 21 Am. St. R. 135.

[1] Greenwood *v.* Marginal Freight R. Company, 105 U. S. 14, per Miller, J.; New Orleans, etc., R. R. Co. *v.* Delamore, 114 U. S. 501. See, also, People *v.* O'Brien, 45 Hun (N. Y.) 519, s. c. 111 N. Y. 1, 7 Am. St. R. 684, and note; Orr *v.* Bracken County, 81 Ky. 593; County of San Mateo *v.* Southern Pac. R. R. Co., 8 Sawy. (U. S.) 238, 279; State *v.* Noyes, 47 Me. 189; City of Detroit *v.* Detroit Plank Road Co., 43 Mich. 140. Some of these cases, notably the New York and Maine cases, go still further and apply this rule to franchises.

[2] Greenwood *v.* Marginal Freight R. Company, 105 U. S. 14; Thornton *v.* Marginal Freight, etc., Co., 123 Mass. 32.

[3] Greenwood *v.* Marginal Freight R. Company, 105 U. S. 14.

[4] Greenwood *v.* Marginal Freight R. Company, 105 U. S. 14.

[5] Greenwood *v.* Marginal Freight R. Company, 105 U. S. 14.

[6] Erie, etc., R. Co. *v.* Casey, 26 Pa. St. 287.

§ 60. Repeal of by general laws.—Where power to repeal is reserved, a special charter may be repealed by a general law,[1] even, it has been held, where no reference is made to the charter repealed,[2] but a general law can have such an effect only where it is so opposed to the provisions of the charter that both acts may not stand together.[3] The repeal of a general incorporating act does not, however, affect the charter rights of a corporation previously organized under its provisions,[4] unless such is the intention of the legislature.[5]

§ 61. Charter is subject to general laws reserving power to repeal.—A charter, unless otherwise provided, is subject to the general laws in force when it was granted,[6] and, therefore, a general law reserving the power to alter, amend or repeal corporate charters generally is taken as forming part of all charters afterward granted.[7] For this reason, as already stated,[8] the amendment or repeal of the charter where such a general law existed at the time it was granted is not, ordinarily, a violation of the provision of the constitution of the United States forbidding the impairment of the obligation of contracts. And the fact that part of such a general statute is incorporated into

[1] State *v.* Commissioners, etc., 37 N. J. L. 228; Mechanics and Traders Bank *v.* Bridges, 30 N. J. Law 112. That the charter may be revoked by a change in the constitution of the state, as well as by statute, where power to repeal has been reserved, see Matter of Lee & Co.'s Bank, 21 N. Y. 9.

[2] State *v.* Commissioners, etc., 37 N. J. L. 228. But see City of Grand Rapids *v.* Grand Rapids Hydraulic Co., 66 Mich. 606, 33 N. W. R. 749; New Jersey *v.* Yard, 95 U. S. 104, same case as above.

[3] State *v.* Commissioners, etc., 37 N. J. L. 228. See, also, Bangor R. Co. *v.* Smith, 47 Me. 34; Union Imp. Co. *v.* Commonwealth. 69 Pa. St. 140.

[4] Bewick *v.* Alpena Harbor Co., 39 Mich. 700; Donworth *v.* Coolbaugh, 5 Iowa 300; Freehold Mut. Loan Ass'n *v.* Brown, 29 N. J. Eq. 121; Union Hebrew Ass'n *v.* Benshimol, 130 Mass. 325; Bibb *v.* Hall, 101 Ala. 79, 59 Am. & Eng. R. R. Cas. 62.

[5] See Wilson *v.* Tesson, 12 Ind. 285; 2 Spel. Priv. Corp., § 1066.

[6] Pratt *v.* Atlantic, etc., R. Co., 42 Me. 579.

[7] Massachusetts Genl. Hospital *v.* State Mut. L. A. Co., 4 Gray (Mass.) 227; Suydam *v.* Moore, 8 Barb. (N.Y.) 358; Tomlinson *v.* Branch, 15 Wall. (U. S.) 460; Griffin *v.* Kentucky Ins. Co., 3 Bush (Ky.) 592; State *v.* Person, 32 N. J. L. 134; *In re* Lee's Bank, 29 N.Y. 9; Commissioners *v.* Holyoke, etc., Co., 104 Mass. 446.

[8] *Ante*, § 56.

a charter, does not, by implication, repeal the rest of the statute.[1]

§ 62. **Expiration of charter.**—The existence of railroad companies incorporated by special charter,[2] as that of other business corporations,[3] is frequently limited to a term of years; and some of the states having general laws for the formation of such corporations limit the time for which a corporation may be formed under them.[4] Where there are no provisions for renewal of the corporation[5] or where no advantage is taken of such provisions, the corporation is *ipso facto* dissolved upon the expiration of the time for which it was chartered.[6] It is not necessary that a dissolution should be judicially decreed,[7] but the plea of *nul tiel* corporation may be interposed to any suits which it may bring,[8] and any member may, in a proper case, insist upon a distribution of its assets.[9] If the charter is to continue until a certain day, the corporation expires at the close of the preceding day.[10] But it has been held that a general statute limiting the life of corporations will not affect a corporation organized under a special charter, to which no particular reference is made in the general act.[11] If the charter of a company be suffered to expire the legislature can not then

[1] Angell & Ames on Corp., § 767, citing Pratt *v.* Atlantic, etc., R. Co., 42 Me. 579.

[2] For instances of such charters of limited duration, see Charter of the Union Railroad Co., Local Laws Ind., 1838, p. 131; of Newburgh and Vanderburgh Railroad Co., Local Laws Ind., 1850, p. 308.

[3] Beach on Railways, § 577.

[4] R. S. Ill. Ch. 114, § 1; Rev. L. (1884) La., § 684. See R. S. Mo., § 926.

[5] For examples of such provisions, see R. S. Ill. Ch. 114, § 5; N.Y. Laws, 1890, Ch. 563, § 22.

[6] Oakland R. Co. *v.* The Oakland, etc., R. Co., 45 Cal. 365.

[7] Merrill *v.* Suffolk Bank, 31 Me. 57, 50 Am. Dec. 649; Sturges *v.* Vanderbilt, 73 N. Y. 384, 390; LaGrange, etc., R. Co. *v.* Rainey, 7 Coldw. (Tenn.) 420; Bank of Gallipolis *v.* Trimble, 6 B. Mon. (Ky.) 599.

[8] *In re* Brooklyn, etc., R. Co., 72 N.Y. 245; Krutz *v.* Paola Town Co., 20 Kan. 397. But see St. Louis Gas Light Co. *v.* St. Louis, 11 Mo. App. 55, 84 Mo. 202.

[9] Mann *v.* Butler, 2 Barb. Ch. (N.Y.) 362; Sturges *v.* Vanderbilt, 73 N.Y. 384; Greely *v.* Smith, 3 Story (U. S.) 657; Bank of Mississippi *v.* Wrenn, 11 Miss. 791; Eagle Chair Co. *v.* Kelsey, 23 Kan. 632; Burns *v.* Metropolitan Bld. Assn., 2 Mackey (D. C.) 7.

[10] People *v.* Walker, 17 N. Y. 502.

[11] Steadman *v.* Merchants', etc., Bank, 69 Tex. 50; State *v.* Ladies of the Sacred Heart, 99 Mo. 533.

renew its charter so as to continue its existence as a corporate body, except by the consent of all the corporators.[1] This is intimated, rather than decided, in the case to which we have referred; but where one becomes a stockholder under a charter expressly limiting the duration of the corporation, and there is no reserved power of amendment or repeal, it seems clear to us that he can not be compelled to remain or become a stockholder in what is virtually a new corporation by a renewal of the charter after the corporation had ceased to exist by reason of the expiration of the original charter.

[1] Bailey *v.* Hollister, 26 N. Y. 112. See, generally, upon the subject of rights after charters expire, Union Pacific R. Co. *v.* Chicago, etc., R. Co., 51 Fed. 309; Union Pacific R. Co. *v.* Chicago, etc., R. Co., 163 U. S. 564, s. c. 16 Sup. Ct. R. 1173; Kansas, etc., Railway Co. *v.* Smith, 40 Kan. 192, s. c. 19 Pac. R. 636; Council Grove, etc., R. Co. *v.* Laurence, (Kan.) 45 Pac. R. 125; Detroit, etc., Co. *v.* Macomb Circuit Judge, (Mich.) 67 N. W. R. 531. As to the effect of laws passed after the enactment of the charter but prior to acceptance, see, Planters, etc., Co. *v.* Tennessee, 161 U. S. 193, 16 Sup. Ct. R. 466.

CHAPTER V.

FRANCHISES.

§ 63. Definition.
64. Charter and franchise distinguished.
65. Grant of corporate franchises.
66. Consideration for the grant of a franchise.
67. Nature of a franchise further considered.
68. Franchise of being a corporation.
69. Difference between a franchise and a license.
§ 70. Sale of corporate property essential to exercise of franchises —Limitation of right to sell.
71. Effect of attempt to sell franchise.
72. Judicial sale of franchises.
73. Sequestration.
74. Seizure of corporate franchise under power of eminent domain.
75. Dissolution effected by authorized sale of franchises.

§ 63. **Definition.**—In its broad signification the term "franchises" means "special privileges conferred by government on individuals, and which do not belong to the citizens of the country generally by common right,"[1] but the meaning of the term "corporate franchises" is not so comprehensive. We suppose that the term "corporate franchises" means such special rights and privileges as are conferred upon corporations by the legislative power. We do not include in our definition corporate immunities because immunities are not always franchises,[2] although they may sometimes be properly considered

[1] Angell & Ames Corp., § 4.

[2] In the case of Keokuk, etc., Co. *v.* Missouri, 152 U. S. 301, s. c. 14 Sup. Ct. R. 592, attention is directed to an apparent conflict in the decisions. We quote the following from the opinion in that case: "In Chesapeake, etc., Ry. Co. *v.* Miller, 114 U. S. 176, 5 Sup. Ct. R. 813, it was held that an immunity from taxation enjoyed by the Covington and Ohio Railway Company did not pass to a purchaser of such road under foreclosure of a mortgage, although the act provided that 'said purchaser shall forthwith be a corporation,' and 'shall succeed to all such franchises, rights and privileges * * * as would have been had * * * by the first company but for such sale and conveyance.' It was held, following in this

as such under the statute applicable to the particular instance. The franchises of a railroad corporation are such rights and privileges as are essential to the proper operation of a railroad and necessary to the conduct of the business of a railroad company.[1] Merely transient or personal immunities do not, as we believe, fall within the legal meaning of the term. The distinction between transient immunities and permanent rights and privileges which constitute franchises is one of importance since some franchises may be transferable while mere immunities are not.

§ 64. **Charter and franchise distinguished.**—A charter contains the grant of a franchise, but is not the franchise itself. The charter is the evidence that a franchise has been granted rather than the franchise, for that is the thing the charter grants. The constitutional inhibition against impairing the

particular Morgan *v.* Louisiana, 93 U. S. 217, that the words 'franchises, rights and privileges' did not necessarily embrace a grant of an exemption or immunity. See, also, Picard *v.* East Tenn., etc., R. Co., 130 U. S. 637, 9 Sup. Ct. 640. Upon the other hand, it was held in Tennessee *v.* Whitworth, 117 U. S. 139, 6 Sup. Ct. 649, that the right to have shares in its capital stock exempted from taxation within the state is conferred upon a railroad corporation by state statutes granting to it 'all the rights, powers and privileges' conferred upon another corporation named, if the latter corporation possesses by law such right of exemption; citing in support of this principle a number of prior cases. See, also, Wilmington, etc., R. Co. *v.* Alsbrook, 146 U. S. 279, 297, 13 Sup. Ct. 72."

[1] In the case of Morgan *v.* Louisiana, 93 U. S. 217, 233, it was said: "Much confusion of thought has arisen in this case, and in similar cases, from attaching a vague and undefined meaning to the term 'franchises.' It is often used as synonymous with rights, privileges and immunities, though of a personal and temporary character; so that, if any one of these exists, it is loosely termed a 'franchise,' and is supposed to pass upon a transfer of the franchises of the company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked."

obligation of contracts is not operative upon the charter but upon the contract which the charter contains, and protects franchises because they are valuable property or contract rights.[1]

§ 65. **Grant of corporate franchises.**—A corporate franchise can only be granted by the sovereign. Privileges or rights that are often called franchises may be granted by municipal corporations to railroad companies, but that which is a corporate franchise in the true sense of the term can only be granted by the state. A license to place a railroad track in a street is sometimes called a franchise, but this is an erroneous use of the term. The right to use the street is a privilege or license, not a corporate franchise, except where it is conferred as a franchise by the charter or statute.[2]

§ 66. **Consideration for the grant of a franchise.**—A franchise, using the term "franchise" as meaning a property right vested in a corporation, is always supported by a consideration. This consideration may be the implied undertaking to perform corporate duties beneficial to the public, or it may be an express agreement to do or not to do a designated act. In this respect a franchise differs essentially from a bare license, for a bare license is not supported by any consideration. It is, therefore, entirely consistent with principle to hold that a bare or naked license is revocable and is not protected as a franchise. The license does not become a contract until it is accepted and acts are performed under it which vest the rights of the parties, while a franchise becomes effective upon the acceptance of the charter or the performance of such acts as are required to be performed as conditions precedent to the vesting of the rights granted.[3]

[1] Oakland R. R. Co. *v.* Oakland, etc., Co., 45 Cal. 365.

[2] Chicago, etc., Co. *v.* People, 73 Ill. 541; Metropolitan, etc., Co. *v.* Chicago, etc., Co., 87 Ill. 317. See, generally, State *v.* Hilbert, 72 Wis. 184, s. c. 39 N. W. R. 326; Saginaw, etc., Co. *v.* City of Saginaw, 28 Fed. R. 529; Jersey City *v.* Jersey City, etc., R. Co., 20 N. J. Eq. 360; Redfield on Railways (3d ed.), 317; 2 Dillon Municipal Corp. (4th ed.) 792; Elliott Roads and Streets 563.

[3] Philadelphia, etc., Co.'s Appeal,

§ 67. **Nature of a franchise further considered.**—The right to exist as a corporation, that is as a legal entity composed of individuals united under a common name, with the capacity both of self-perpetuation and of exercising certain of the powers and privileges of a natural person, such as the power to sue and be sued, to hold and convey property, to make by-laws for the control of its business and to enter into contracts in the corporate name, is often spoken of as the company's *franchise*.[1] On the other hand, the word "franchises" is frequently used to designate those special privileges and powers conferred upon a corporation for the furtherance of some public work, such as the right to construct a railroad upon lands taken by the right of eminent domain, and "those rights or privileges which are essential to the operations of the corporation, and without which its roads and works would be of little value, such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like."[2] In so far as the word is used to designate powers which an individual may not exercise without a

102 Pa. St. 123. See, generally, Henderson *v.* Central, etc., Co., 21 Fed. R. 358; Western, etc., Co. *v.* Citizens', etc., Co., 128 Ind. 525; Indianapolis, etc., Co. *v.* Citizens' Co., 127 Ind. 369; People, *ex rel.* Maybury, *v.* Mutual, etc., Co., 38 Mich. 154; Atchison St. R. Co. *v.* Nave, 38 Kan. 744; Galveston City, etc., Co. *v.* Galveston City St. R. Co., 63 Tex. 529; Great Central R. Co. *v.* Gulf, Colorado & Santa Fe R. Co., 26 Am. & Eng. Ry. Cases 114; City of Detroit *v.* Detroit, etc., Co., 37 Mich. 558; Gulf City, etc., Co. *v.* Galveston, 65 Tex. 502; People's Railroad *v.* Memphis Railroad, 10 Wall. 38.

[1] 2 Blackstone's Com. 37. The right to carry on business in the corporate name, to make contracts, to sue and be sued, and to acquire and hold property as a corporate body, and to be exempt from liability for the debts of its stockholders, and solely liable for the debts and liabilities contracted by it, with such other rights as enable the corporation to act as a person or legal entity, are called ordinary franchises and may be exercised in any jurisdiction where such exercise is not expressly prohibited. Prerogative franchises, such as the exercise of the right of eminent domain, arise from a special grant, and can only be exercised by either an individual or a corporation by authority of such a grant and within the jurisdiction of the state by which the grant is made. Wood Ry. Law, § 14; Rorer on Railroads, 74.

[2] Morgan *v.* Louisiana, 93 U. S. 217; Lawrence *v.* Morgan's Louisiana, etc., Co., 39 La. Ann. 427, s. c. 2 So. R. 69; State of Vermont *v.* Boston, etc., R. Co., 25 Vt. 433. The right to take tolls is a special franchise. Beekman *v.* Saratoga, etc., R. Co., 3 Paige 45.

special grant of authority from the legislature[1] (for example, eminent domain), a franchise has, ordinarily, no transferable value,[2] and, though it may be valued for taxation separately from the capital stock and property,[3] it can not, as a rule, be transferred by sale,[4] mortgage,[5] or assignment,[6] nor can it be sold on execution,[7] unless the legislature has provided for such

[1] To the effect that franchises to build, own and manage a railroad are not necessarily corporate nor unassignable, see Ragan *v.* Aiken, 9 Lea (Tenn.) 609; Bank of Middlebury *v.* Edgerton, 30 Vt. 182.

[2] Morawetz on Priv. Corp., § 929.

[3] Wilmington, etc., R. Co. *v.* Board, etc., 72 N. C. 10; Corporate taxation, 23 Am. & Eng. Enc. of Law.

[4] Beach on Priv. Corp., § 361, and cases cited. No transfer of the property and franchises of a corporation will invest the purchasers with corporate existence. New Orleans, etc., R. Co. *v.* Delamore, 114 U. S. 501; Chaffe *v.* Ludeling, 27 La. Ann. 607; Black *v.* Delaware, etc., Co., 24 N. J. Eq. 455; Fietsam *v.* Hay, 122 Ill. 293; Atkinson *v.* Marietta, etc., R. Co., 15 Ohio St. 21, 35; Oregon R. Co. *v.* Oregonian R. Co., 130 U. S. 1; Gulf, etc., R. Co. *v.* Morris, 67 Tex. 692; Middlesex R. Co. *v.* Boston, etc., R. Co., 115 Mass. 347; Coe *v.* Columbus, etc., Co., 10 Ohio St. 372; Memphis, etc., Co. *v.* Railroad Commissioners, 112 U. S. 609; Commonwealth *v.* Smith, 10 Allen 448, s. c. 87 Am. Dec. 672; Rollins *v.* Clay, 33 Me. 132.

[5] Richardson *v.* Sibley, 11 Allen (Mass.) 65; Daniels *v.* Hart, 118 Mass. 543; Black *v.* Delaware, etc., Co., 22 N. J. Eq. 130, 396; Lauman *v.* Lebanon Val. R. Co., 30 Pa. St. 42; Woodruff *v.* Erie R. Co., 25 Hun (N.Y.) 246; Frazier *v.* East Tennessee, etc., R. Co., 88 Tenn. 138. *Contra*, Shepley *v.* Atlantic, etc., R. Co., 55 Me. 395; Meyer *v.* Johnston, 53 Ala. 237. The franchise of being a corporation is not included in a mortgage of all the property and franchises of a railroad, unless by positive provision of law. Memphis, etc., R. Co. *v.* Railroad Commissioners, 112 U. S. 609; New Orleans, etc., R. Co. *v.* Delamore, 114 U. S. 501; Beach on Ry. Law, § 616. See Snell *v.* City of Chicago, 133 Ill. 413, s. c. 24 N. E. R. 532; Pumphrey *v.* Threadgill (Tex.) 30 S. W. R. 356.

[6] Beach on Priv. Corp., § 361; Angell & Ames, § 191; Hurlbut *v.* Carter, 21 Barb. 221; Frazier *v.* East Tenn., etc., R. Co., 88 Tenn. 138, 40 Am. & Eng. R. Cas. 358; Richardson *v.* Sibley, 11 Allen (Mass.) 65; Bowen *v.* Lease, 5 Hill (N. Y.) 221; Memphis, etc., R. Co. *v.* Railroad Commissioners, 112 U. S. 609, 619.

[7] Randolph *v.* Larned, 27 N. J. Eq. 557. But see State *v.* Rives, 5 Ired. L. (N. C.) 297; Lawrence *v.* Morgan's, etc., Co., 39 La. Ann. 427. Property essential to the exercise of a franchise may not be separated from it and sold on execution. East Alabama R. Co. *v.* Doe, 114 U. S. 340; Youngman *v.* Elmira, etc., R. Co., 65 Pa. St. 278; Baxter *v.* Nashville, etc., Turnpike Co., 10 Lea (Tenn.) 488; Louisville, etc., R. Co. *v.* Boney, 117 Ind. 501; Indianapolis, etc., G. R. Co. *v.* State, 105 Ind. 37; East Alabama R. Co. *v.* Doe, 114 U. S. 340.

a transfer in the charter or in some general statute.[1] Where such provision is made, the grantee receives the franchise indirectly from the legislature by virtue of the power given to the corporation.[2]

§ 68. **Franchise of being a corporation.**—Confusion often results from the failure to discriminate between the franchise of being a corporation and the franchise of acquiring rights and exercising corporate functions as a corporation. The difference between the franchise of being a corporation and the franchise of exercising rights as a corporation is important. A corporation may be invested with the franchise of existing as a corporation and yet not endowed with the right to do acts it claims power to do. Thus, a water company may be invested with the franchise of being a corporation and yet not possess the franchise of furnishing a city with water.[3] In another case the question was as to the right to acquire and hold property, and the distinction between the capacity to acquire property and the franchise to be a corporation was clearly drawn.[4] The question received very full con-

[1] East Boston Freight R. Co. *v.* Eastern R. Co., 13 Allen (Mass.) 422; State *v.* Sherman, 22 Ohio St. 411, 428; Mahaska, etc., R. Co. *v.* Des Moines Valley R. Co., 28 Iowa 437; State *v.* Richmond, etc., R. Co., 72 N. C. 634. Where such acts are done without authority, the legislature may, by ratifying and confirming them, render them valid. Shaw *v.* Norfolk, etc., R. Co., 5 Gray (Mass.) 162, 179; Richards *v.* Merrimack, etc., Co., 44 N. H. 127, 136; Branch *v.* Jessup, 106 U. S. 468; Shaw *v.* Norfolk, etc., R. Co., 5 Gray (Mass.) 162; Hall *v.* Sullivan R. Co., 21 Law Reporter 138; Pollard *v.* Maddox, 28 Ala. 321; Waterman on Corp., § 159.

[2] Taylor on Priv. Corp., (2d ed.) § 131.

[3] Andrews *v.* National Foundry and Pipe Works, 61 Fed. R. 782. In the opinion in that case it was said: "By its act of incorporation, the Oconto Water Company came into being, endowed not with the right to establish and maintain water-works in Oconto, but with capacity to receive and exercise that right." This illustrates the doctrine we are endeavoring to make clear, namely, that the franchise of being a corporation is essentially different from a right to receive property or the capacity to perform duties. Doubtless the power and capacity may often be implied from the charter or statute creating the corporation, but they are not to be implied from the bare franchise of being a corporation.

[4] Southern, etc., Co. *v.* Orton, 32 Fed. R. 457, 473. Judge Sawyer, in the course of his very able opinion, said: "The creative act necessarily

sideration in still another case, and the rule was well stated by the court and its position enforced with great strength.[1]

extends only to the bringing into being of an artificial person, with the capacities stated, among which is, 'a capacity to receive and enjoy in common grants and privileges and immunities;' that is to say, a capacity to receive and enjoy such grants, privileges and immunities as may be made either at the time of the creation or any other time. The creation of the being, with the capacity to receive grants, is one thing; the granting of other privileges and immunities, which it has the capacity to receive when created, is another. When such a being is brought into existence, a corporation has been created. A legal entity, a person, has been created, with a capacity to do, by its corporate name, such things as the legislative power may permit, and receive such grants of such rights and privileges, and of such property, as the legislature itself, or private persons with the legislative permission, may give. But I do not understand that every right, privilege or grant that can be conferred upon a corporation must be given simultaneously with the creative act of incorporation. On the contrary, I suppose the artificial being must be created with a capacity to receive before anything can be received. The right to be a corporation is itself a separate, distinct and independent franchise, complete within itself, and a corporation having been created, enjoying this franchise, may receive a grant and enjoy other distinct and independent franchises, such as may be granted to and enjoyed by natural persons. But because it enjoys the latter franchises, they do not, therefore, constitute a part of the distinct and independent essential franchise—the right to be a corporation. They are additional franchises given to the corporation, and not parts of the corporation itself,—not of the essence of the corporation."

[1] In the case of Coe *v.* Columbus, etc., Co., 10 Ohio St. 372, s. c. 75 Am. Dec. 518, speaking of the distinction referred to in the text, the court said: "This distinction has been clearly pointed out in a recent case, in which it is said: 'Among the franchises of the company is that of being a body politic, with rights of succession of members, and of acquiring, holding and conveying property, and suing and being sued, by a certain name. Such an artificial being only the law can create; and when created it can not transfer its own existence into another body, nor can it enable natural persons to act in its name, save as its agents or as members of the corporation, acting in conformity with the modes required or allowed by its charter. The franchise to be a corporation, is, therefore, not a subject of sale and transfer, unless the law, by some positive provision, has made it so, and pointed out the modes in which such sale and transfer may be effected. But the franchises to build, own and manage a railroad, and to take tolls thereon, are not necessarily corporate rights; they are capable of existing in and being enjoyed by natural persons; and there is nothing in their nature inconsistent with their being assignable'. Hall *v.* Sullivan Railroad Co., 21 Law Reporter 138, 140, s. c. 1 Brun. Col. Cas. 613, Curtis, J. Very similar language is used in a recent case in Vermont. Bank of Middlebury *v.* Edgerton, 30 Vt. 182–190." The same general doctrine is asserted in Grand Rapids,

§ 69. Difference between a franchise and a license.—A distinction must be kept in mind between a charter franchise constituting a contract on the part of the state in consideration of certain duties which, by accepting the charter, the corporation undertakes to perform, and a mere legislative permission or license, which is revocable at the pleasure of the grantor. A supplement to a charter,[1] or a general statute or ordinance,[2] which confers new rights or privileges for an indefinite time without the imposition of any new burdens, amounts to a mere license. A mere naked license is revocable at the pleasure of the legislature, but where there is money expended upon the faith that a permanent right is granted, it seems to us that the license is not revocable. This opinion is, we know, opposed by eminent judges and authors, but it seems to us to rest on sound and solid principle.[3] Of course, the doctrine we favor can not prevail where there is no grant of a permanent right and the parties understand, or are bound to know, that a mere temporary privilege is granted, but where the privilege is in its nature permanent and is acted upon as such by the parties in good faith, and money is expended in the just belief that the right is of a permanent nature, the party making the expenditure is entitled to protection.[4]

etc., Co. *v.* Prange, 35 Mich. 400; Fort Worth, etc., Co. *v.* Rosedale, etc., Co., 68 Tex. 169, 176.

[1] Philadelphia, etc., R. Co.'s Appeal, 102 Pa. St. 123. See Johnson *v.* Crow, 87 Pa. St. 184; Christ Church *v.* County of Philadelphia, 24 How. (U. S.) 300.

[2] Southwark R. Co. *v.* City of Philadelphia, 47 Pa. St. 314; Branson *v.* City of Philadelphia, 47 Pa. St. 329.

[3] Professor Hare, referring to the Pennsylvania cases cited in the following note, says: "These decisions are obviously sound. An individual who gives a license which can not be enjoyed without the expenditure of money may fairly be presumed to intend that it shall be irrevocable, but no such inference can be drawn where the state or city is dealing with a highway, and ought to retain the power of supervision and control." 1 Hare's Am. Const. Law, 666.

[4] Some of the cases hold that such a license is revocable, although the grantee has made valuable improvements in the belief that the privilege will not be recalled. Branson *v.* City of Philadelphia, 47 Pa. St. 329; Monongahela, etc., Co. *v.* Coons, 6 Watts & S. 101; Southwark R. Co. *v.* City of Philadelphia, 47 Pa. St. 314; Beach Priv. Corp., § 21. But there is conflict on this point. Campbell *v.* Indianapolis, etc., R. Co., 110 Ind. 490. People *v.* Chicago, etc., Co., 18 Ill. App. 125; People *v.* O'Brien, 111 N.

§ 70. **Sale of corporate property essential to exercise of franchises — Limitation of right to sell.** — According to the greater weight of authority, a railroad corporation may not transfer any of its property or privileges which are essential to a fulfillment of the purposes for which it was chartered, except by legislative authority. Property not held for strictly corporate purposes, that is property not necessary to enable the corporation to exercise its corporate functions and perform its corporate duties may be sold; but property necessary for corporate use can not be sold or transferred where its sale would render the corporation unable to perform its corporate duties. In other words, a corporation can not sell or transfer its property in cases where such a sale or transfer would disable it from performing its corporate duties and exercising its corporate functions except in cases where there is legislative authority to make such sales or transfers.[1]

§ 71. **Effect of attempt to sell franchise.**—Though all of the property of the corporation should pass into the hands of a purchaser, he would not by such purchase, necessarily, become entitled to the franchises,[2] in the absence of any law giving authority to dispose of the corporate rights and privileges;

Y. 1, s. c. 7 Am. St. R. 684; State *v.* Noyes, 47 Me. 189; Com. *v.* Proprietors, etc., 2 Gray 339; Elliott's Roads and Streets, 563, 564.

[1] Thomas *v.* West Jersey Co., 101 U. S. 71; Pennsylvania Co. *v.* St. Louis, etc., Co., 118 U. S. 290, s. c. 6 Sup. Ct. R. 1094; Oregon *v.* Oregonian, etc., Co., 130 U. S. 1, s. c. 9 Sup. Ct. R. 409; Central Transportation Co. *v.* Pullman, etc., Co., 139 U. S. 24, s. c. 11 Sup. Ct. R. 478; York, etc., Co. *v.* Winans, 17 How. (U. S.) 30; Pearce *v.* Madison, etc., Co., 21 How. (U. S.) 441; Pullan *v.* Cincinnati, etc., Co., 4 Biss. 35; Richardson *v.* Sibley, 11 Allen 65; Vermont, etc., Co. *v.* Vermont, etc., Co., 34 Vt. 1; Black *v.* Delaware, etc., Co., 22 N. J. Eq. 130; Stewart's Appeal, 56 Pa. St. 413; Pittsburgh, etc., Co. *v.* Allegheny County, 63 Pa. St. 126; Hays *v.* Ottawa, etc., Co., 61 Ill. 422; Atlantic, etc., Co. *v.* Union Pacific, etc., Co., 1 Fed. R. 745. The general doctrine was thus stated in Black *v.* Delaware, etc., Co., *supra*. "It may be considered as settled that a corporation can not lease or alienate any franchise, or any property necessary to perform its obligations and duties to the state, without legislative authority."

[2] Pierce *v.* Emery, 32 N. H. 484; Bruffett *v.* Great Western R. Co., 25 Ill. 353, 357; Clarke *v.* Omaha, etc., R. Co., 4 Neb. 458; Atkinson *v.* Marietta, etc., R. Co., 15 Ohio St. 21.

for an authority to mortgage or otherwise transfer the property will not confer power to dispose of the franchises.[1] It is, of course, competent for the legislature to confer power to sell and convey corporate franchises, but the power is not an incidental one and can not exist in the absence of a statute conferring it. The attempt to sell a corporate franchise without statutory authority would be ineffective, and would pass no title, but the question as to who may take advantage of the attempt to sell where the power does not exist is one upon which there is some diversity of opinion. But, in most of the states, railroad corporations are given power by statute to mortgage, or sell, their franchises as well as their tangible property, subject to certain restrictions. [2]

§ 72. **Judicial sale of franchises.**—As a general rule corporate franchises can not be sold on a judgment or decree unless the statute authorizes a sale.[3] Where power is conferred upon a corporation to mortgage all its property and franchises a sale upon a decree foreclosing such a mortgage will convey to the purchaser all such franchises as are necessary to the use and enjoyment of the property bought by him at such sale.[4] The

[1] McAllister *v.* Plant, 54 Miss. 106; Pullan *v.* Cincinnati, etc., R. Co., 4 Biss. (U. S.) 35. See City of Philadelphia *v.* Western U. Tel. Co., 11 Phila. 327. But compare Pumphrey *v.* Threadgill, (Tex.) 30 S. W. R. 356.

[2] Stimson's Am. Stat. (1892), § 8642. In the United States it would be difficult to find a railroad that has not mortgaged its road and franchise, and in most instances under express legislative authority. Taylor on Priv. Corp. (2d ed.), § 305.

[3] Wellsborough *v.* Griffin, 57 Pa. St. 417; Ammant *v.* President, etc., 13 Serg. & R. 212; Leedom *v.* Plymouth, etc., Co., 5 Watts & S. 265; Wood *v.* Truckee, etc., Co., 24 Cal. 474; Gue *v.* Tidewater, etc., Co., 24 How. U. S. 257; Plymouth, etc., Co. *v.* Colwell, 39 Pa. St. 337; Youngman *v.* Railroad Co., 65 Pa. St. 278. See State *v.* Rives, 5 Ired. 297; Coe *v.* Cincinnati, etc., Co., 10 Ohio St. 372, s. c. 75 Am. Dec. 518; Coe *v.* Peacock, 14 Ohio St. 187; Stewart *v.* Jones, 40 Mo. 140; Railroad *v.* James, 6 Wall. 750; Foster *v.* Fowler, 60 Pa. St. 27; Richardson *v.* Sibley, 11 Allen 65, s. c. 87 Am. Dec. 700.

[4] In New Orleans, etc., Co. *v.* Delamore, 114 U. S. 501, s. c. 5 Sup. Ct. R. 1009, the court said: "When there has been a judicial sale of railroad property under a mortgage authorized by law, covering its franchise, it is now well settled that the franchises necessary to the use and enjoyment of the railroad passes to the purchaser." Memphis, etc., Co. *v.* Railroad Commissioners, 112 U. S. 609; Chaffe *v.* Ludeling, 27 La. Ann. 607; Metz *v.* Buffalo, etc., Co., 58 N. Y. 61, s. c. 17

franchise to be a corporation does not pass to the purchaser unless a clear provision of positive law makes it transferable. The franchise of being a corporation is a peculiar one, and, as we have seen, is essentially different from other corporate franchises; so peculiar is it that ordinarily it is not assignable and, indeed, is never assignable except when made so by statute.[1] The right to sell corporate franchises being statutory the general rule is that the sale must be conducted in substantial conformity to the requirements of the statute, and where a mode is provided for making the sale it is exclusive and must be pursued.[2] The purchaser at a valid judicial sale takes all the property and franchises of the corporation in cases where the sale of such property and franchises is authorized by statute, but is not bound for the debts of the corporation.[3] The franchises which pass by the sale are, however, such only as by law can be sold and transferred. Purchasers at such a sale may organize a new corporation, and generally the new corporation will succeed to the franchises of the old (provided, of course, there was authority to sell the franchises) except the franchise to be a corporation. That franchise does not come from the sale but from the sovereign.

§ 73. **Sequestration.**—The process of sequestration is a writ or commission issued to some officer or person empowering him to enter into possession of property and receive the rents, revenues or profits thereof, and to apply them as the court may order or adjudge.[4] The statutes in most of the states have

Am. R. 201; People *v.* Brooklyn, etc., Co., 89 N. Y. 75; Atkinson, etc., Co. *v.* Marietta, etc., Co., 15 Ohio St. 21.

[1] Memphis, etc., Co. *v.* Railroad Commissioners, 112 U. S. 609; Willamette, etc., Co. *v.* Bank, 119 U. S. 191; Hall *v.* Sullivan, etc., Co., 1 Brunner C. C. 613; Com. *v.* Smith, 10 Allen 448, s. c. 87 Am. Dec. 672; Adams *v.* Boston, etc., Co., 4 Nat. Bank Reg. (314) 99; Sweatt *v.* Boston, etc., Co., 5 Nat. Bank Reg. 234; Grand Rapids, etc., Co. *v.* Prange, 35 Mich. 400; Eldridge *v.* Smith, 34 Vt. 484.

[2] James *v.* Pontiac, etc., Co. 8 Mich. 91. See, generally, Titcomb *v.* Union Marine, etc., Co., 8 Mass. 326; Howe *v.* Starkweather, 17 Mass. 240; Stamford Bank *v.* Ferris, 17 Conn. 259.

[3] Vilas *v.* Milwaukee, etc., Co., 17 Wis. 497; Smith *v.* Chicago, etc., Co., 18 Wis. 17; Stewart, etc., Co.'s Appeal, 72 Pa. St. 291.

[4] Hinde's Ch. Pr. 127; Angell & Ames on Corp., §§ 670, 671.

supplanted the old chancery doctrine, in others its existence has been denied upon the ground that the courts did not possess inherent equity powers, in others the doctrine has been modified, and in some others prevails without substantial change.[1] In many respects decrees appointing receivers for railroad corporations accomplish essentially the same results as those accomplished by sequestration, and the process of sequestration is seldom employed in jurisdictions where the authority to appoint receivers is broad and comprehensive.[2] As is the case where receivers are appointed the appointment of a sequestrator does not, as a general rule, end the corporate existence, but the sequestrator takes possession of the corporate property and employs the corporate franchises in conducting business. If the debts are discharged in full the property and franchises, as a rule, revert to the corporation.[3] The money received by the sequestrator of a corporation is to

[1] Earl of Kildare *v.* Eustace, 1 Vern. 419; Lowten *v.* Mayor, 2 Merivale 393; McKim *v.* Odom, 3 Bland Ch. 407; Grew *v.* Breed, 12 Met. (Mass.) 363; Johnson *v.* Chippendall, 2 Sim. 55; Francklyn *v.* Colhoun, 3 Swanst. 276; Ammant *v.* New Alexandria, etc., Co., 13 Serg. & R. 210; Clarkson *v.* DePeyster, 3 Paige, 320; Devoe *v.* Ithaca, etc., Co., 5 Paige 521; Judson *v.* Rossie Galena R.Co.,9 Paige 598; Cook *v.* Detroit, etc., R. Co., 45 Mich. 453; Jones *v.* Boston, etc., Co., 4 Pick. 507; Bangs *v.* McIntosh, 23 Barb. 591; Reid *v.* Northwestern, etc., Co., 32 Pa. St. 257; Germantown, etc., Co. *v.* Fitler, 60 Pa. St. 124, s. c. 100 Am. Dec. 546; Mann *v.* Pentz, 3 N. Y. 415; Foster *v.* Fowler, 60 Pa. St. 27; Steiner's Appeal, 27 Pa. St. 313; Penrose *v.* Erie, etc., Co., 56 Pa. St. 46, s. c. 93 Am. Dec. 778; McKusick *v.* Seymour, 48 Minn. 172, 50 N. W. R. 1114; Muncy Creek, etc., Co. *v.* Hill, 84 Pa. St. 459; Hospes *v.* Northwestern, etc., Co., 48 Minn. 174, s. c. 50 N. W. R. 1117; Cypress Shingle Co. *v.* Lorio, 46 La. Ann. 441, s. c. 15 So. R. 95.

[2] In addition to those cases cited in preceding note relative to process of sequestration we cite, Ford *v.* Plankinton Bank, 87 Wis. 363, s. c. 58 N. W. R. 766; Morgan *v.* Turner, 4 Tex. Civ. App. 192, s. c. 23 S. W. R. 284; Bloom *v.* Burdick, 1 Hill 130; Rankine *v.* Elliott, 16 N. Y. 377; Foster *v.* Townshend, 68 N. Y. 203; Donnelly *v.* West, 17 Hun (N. Y.) 564; London, etc., Co. *v.* Morphy, 10 Ont. 86, s. c. 12 Am.& Eng. Corp.Cas.53; Neall *v.* Hill, 16 Cal. 145, 150; Craddocks *v.* Ins. Co., 5 Phila. 249; Rodbourn *v.* Utica, etc., R. Co., 28 Hun 369; Mott *v.* Union Bank, 38 N. Y. 18; Loder *v.* New York, etc., Co., 4 Hun 22.

[3] Mann *v.* Pentz, 3 N. Y. 415; Kincaid *v.* Dwinelle, 59 N. Y. 548; Hollingshead *v.* Woodward, 35 Hun 410; Parry *v.* American Opera Co., 12 Civ. Pro. R. (N. Y.) 194; Angell *v.* Silsbury, 19 How. Pr. 48.

be distributed among the creditors in substantially the same manner as in the case of the insolvency of a natural person.[1]

§ 74. **Seizure of corporate franchise under power of eminent domain.**—The corporation has a property interest in its franchises, and they may not be taken from it by the legislature and conferred upon another company without compensation;[2] but they are subject to the power of eminent domain and may be taken under that power whenever the interests of the public require it.[3] Property of this kind, however, is so far favored in law that authority to take the franchise of a corporation will not be implied from a grant of power to take property, conferred in general terms,[4] unless the taking be necessary to carry out the purposes of the charter containing such a grant.[5] The intention to grant such power must appear by express words,[6] or by necessary implication.[7]

§ 75. **Dissolution effected by authorized sale of franchises.**—The power of the legislature to authorize the sale of all corporate franchises is, as we have seen, undoubted, and when a sale is made pursuant to a valid statute of all franchises the

[1] Steiner's Appeal, 27 Pa. St. 313. The sequestrator may be empowered to sell the corporate property, or he may be authorized to use the property and franchises until enough money is earned to satisfy the claims of creditors.

[2] Boston Water Power Co. *v.* Boston, etc., R. Co., 23 Pick. (Mass.) 360.

[3] Newcastle R. Co. *v.* Peru R. Co., 3 Ind. 464; Richmond R. Co. *v.* Louisa R. Co., 13 How. (U. S.) 71; Jersey City, etc., R. Co. *v.* Jersey City, etc., R. Co., 20 N. J. Eq. 61; Northern R. Co. *v.* Concord, etc., R. Co., 27 N. H. 183; New York, etc., R. Co. *v.* Boston, etc., R. Co., 36 Conn. 196; Beekman *v.* Saratoga R. Co., 3 Paige Ch. (N.Y.) 45.

[4] Matter of Buffalo, 68 N. Y. 167.

[5] Little Miami, etc., R. Co. *v.* Dayton, 23 Ohio St. 510; *In re* Boston, etc., R. Co., 53 N. Y. 574; Milwaukee, etc., R. Co. *v.* City of Faribault, 23 Minn. 167; Mobile, etc., R. Co. *v.* Alabama Midland R. Co., 87 Ala. 501.

[6] Clarence R. Co. *v.* Great North of England Junction R. Co., 4 Q. B. 46.

[7] Hickok *v.* Hine, 23 Ohio St. 523. To justify such a taking there must be a necessity so absolute that, without it, the grant itself will be defeated. It must also be a necessity that arises from the very nature of things over which the corporation has no control; it must not be created by the company itself for its own convenience or for economy. Appeal of Sharon R. Co., 122 Pa. St. 533; Pennsylvania R. Co.'s Appeal, 93 Pa. St. 150.

corporate existence necessarily terminates.[1] We suppose that the authorized sale of part of the corporate franchises would not necessarily and of itself work a dissolution of the corporation, but each case must, as we believe, be determined upon the statute authorizing the sale. If the franchise of being a corporation is authorized to be sold then a sale pursuant to the statute would terminate the corporate existence, but an authorized sale of the franchise to do certain acts not constituting the whole of the corporate franchises would not have that effect.

[1] Snell *v.* City of Chicago, 133 Ill.413, s. c. 24 N. E. R. 532, citing State *v.* Sherman, 22 Ohio St. 411; Memphis, etc., R. Co. *v.* Commissioners, 112 U. S. 609, s. c. 5 Sup. Ct. R. 299; Thomas *v.* Dakin, 22 Wend. 9, 71; Pierce *v.* Emery, 32 N. H. 484; Turnpike Co. *v.* Illinois, 96 U. S. 63.

CHAPTER VI.

STOCK.

§ 76. Definition.
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§ 76. **Definition.** — Capital stock has been defined as "the sum fixed by the corporate charter as the amount paid in or to be paid in by the stockholders for the prosecution of the business of the corporation and for the benefit of corporate creditors."[1] The term is often used to denote the capital or property of the

[1] 1 Cook on Stock and Stockholders, § 9.

corporation,[1] but, strictly speaking, the capital stock is not identical with the corporate property or capital.[2] It represents, rather, the capital or property of the corporation to the extent required by its charter,[3] and may be said, in one sense at least, to describe or evidence the interest of the stockholders in the corporation and to consist of the sum of all the shares.[4] It remains fixed and can not exceed the amount authorized by the charter or statute and articles of incorporation, while the capital or property may vary greatly in value from time to time and may exceed the amount of capital stock authorized by the charter.[5] This excess over and above the amount of the required and authorized capital stock, arising generally out of the transaction of the corporate business and consisting of profits, may be divided among the stockholders by way of dividends in the discretion of the directors, and does not constitute part of the capital stock,[6] although, until a division is made, or, at least, until a dividend is declared, it remains the property of the corporation.[7] For these reasons it seems clear that

[1] So used in Wood on Railroads, § 15; State *v.* Norwich, etc., R. R. Co., 30 Conn. 290; New Haven *v.* City Bank, 31 Conn. 106; People *v.* Commissioners, 23 N. Y. 192, 220, 222, opinion of Comstock, C. J.; People *v.* Coleman, 126 N. Y. 433.

[2] Stock dividends and their restraint, 7 Am. Bar Assn. R. 257; State Bank *v.* Milwaukee, 18 Wis. 281, 295; State *v.* Morristown Fire Ass'n, 23 N. J. L. 195; Tennessee *v.* Whitworth, 117 U. S. 129, s. c. 6 Sup. Ct. R. 645, 648.

[3] See Hannibal, etc., R. R. Co. *v.* Shacklett, 30 Mo. 550; Williams *v.* Western Union Tel. Co., 93 N. Y. 162, 188.

[4] See People *v.* Chicago, etc., Co. 130 Ill. 268, 22 N. E. R. 798; Tradesman, etc., Co. *v.* Knoxville, etc., Co., (Tenn.) 32 S. W. R. 1097; Lowell Transfer of Stock, §4; "Stock dividends and their restraint," 7 Am. Bar Ass'n R. 263; Tennessee *v.* Whitworth, 117 U. S. 129, s. c. 6 Sup. Ct. R. 645. But see Wilkes-Barre, etc., Bank *v.* Wilkes-Barre, 148 Pa. St. 601, 24 Atl. R. 111.

[5] Barry *v.* Merchants', etc., Co., 1 Sandf. ch. (N. Y.) 280.

[6] Farrington *v.* Tennessee, 95 U. S. 679; Hightower *v.* Thornton, 8 Ga. 486, s. c. 52 Am. Dec. 412; State Bank *v.* Milwaukee, 18 Wis. 281; Williams *v.* Western Union Tel. Co., 93 N. Y. 162; People *v.* Coleman, 126 N. Y. 433. But see Phelps *v.* Farmers', etc., Bank, 26 Conn. 269.

[7] The interest of a stockholder may, however, exceed in value the nominal or par value of his shares. In a sense, therefore, his actual interest may not depend entirely upon the amount of stock or capital stock authorized. The real value of his shares, which measures his interest, is more often determined by the actual value of all the property of the corporation. Jones *v.* Terre Haute, etc.,

the terms "capital" and "capital stock" are not synonymous, yet they are frequently so used, and the term "capital stock" has often been held to embrace all the property or capital of the corporation, particularly when found in a statute clearly evincing an intention upon the part of the legislature to include all corporate property within the meaning of the term.[1]

§ 77. **Classes of stock.**—Corporate stock—using that term in the sense in which it is generally used in this connection—may be divided into two principal classes, common and preferred, the common stock being subject to a priority as to the payment of dividends in favor of the preferred stock. Other kinds of stock, mostly in the nature of preferred stock, are also frequently issued, such as guaranteed, interest-bearing, income, or debenture stock. And "special stock," having certain peculiarities distinguishing it from ordinary stock, is also authorized in some cases. The different kinds of stock and the distinctions between them will, however, be considered in subsequent sections.

§ 78. **Shares of stock—Certificates.**—The common stock is divided into shares, each of which gives to the owner a proportional part of certain rights in the management and profits of the corporation during its existence, and in the assets upon dissolution.[2] The ownership of these shares is usually evidenced by certificates which set forth the number owned and

R. R. Co., 57 N. Y. 196, and in the recent case of People *v.* Coleman, it is said that the capital stock of the company and the capital stock (or, more properly, the share stock) of the shareholders are two different things; that the property of the corporation may consist of capital stock, which is the fund required to be paid in and kept intact as the basis of the business enterprise, its surplus, and its franchise, neither of which is part of its capital stock; and that the capital stock, or share stock, of the stockholders "covers, embraces, represents, all three in their totality." People *v.* Coleman, 126 N. Y. 433, 438.

[1] Ohio & M. R. R. Co. *v.* Weber, 96 Ill. 443; Security Co. *v.* Hartford, 61 Conn. 89, 23 Atl. R. 699; City of Philadelphia *v.* Ridge Ave. R. R. Co., 102 Pa. St. 190.

[2] Oakbank Oil Co. *v.* Crum, L. R. 8 App. Cas. 65; Fisher *v.* Essex Bank, 5 Gray (Mass.) 373. See, also, Plimpton *v.* Bigelow, 93 N. Y. 592, 599; Field *v.* Pierce, 102 Mass. 253, 261; Bent *v.* Hart, 10 Mo. App. 143; Harrison *v.* Vines, 46 Tex. 15, 21; Bradley *v.* Bauder, 36 Ohio St. 28, 35; Bright-

the amount actually paid thereon, or that they are *paid up*, if such is the case.[1] The possession of such a certificate, however, does not necessarily constitute the holder an owner of the shares it represents;[2] and a person whose name appears in the list of stockholders in the company's books[3] will usually be entitled to transfer his stock,[4] to receive dividends,[5] and to vote in corporation meetings,[6] and may be held liable as a stockholder[7] even though a certificate has not been issued to him,[8] or he has pledged[9] or assigned it. But possession of a certificate, made out in the holder's name, or indorsed with a power of attorney to transfer the stock on the company's books,[10] is *prima facie* evidence of the holder's title to the shares it represents.[11] And the owner of stock has a right to receive a certificate as a voucher for his title, if he asks for it.[12] But the books

well *v.* Mallory, 10 Yerg. (Tenn.) 196; Gibbons *v.* Mahon, 132 U. S. 549.

[1] Morawetz on Priv. Corp., (2d ed.) § 472; Cook on Stock and Stockholders (3d ed.), § 14.

[2] Baker *v.* Woolston, 27 Kan. 185.

[3] Vail *v.* Hamilton, 85 N. Y. 453, 20 Hun 355. See Hawley *v.* Upton, 102 U. S. 314; New Hampshire Central R. Co. *v.* Johnson, 30 N. H. 390.

[4] National Bank *v.* Watsontown Bank, 105 U. S. 217; First Nat. Bank *v.* Gifford, 47 Iowa 575; Butterfield *v.* Spencer, 1 Bosw.(N. Y.)1; Cincinnati, etc., R. Co. *v.* Pearce, 28 Ind. 502.

[5] McNeil *v.* Tenth National Bank, 46 N. Y. 325; Ellis *v.* Proprietors, 2 Pick. (Mass.) 243.

[6] Beckett *v.* Houston, 32 Ind. 393; Evans *v.* Bailey, 66 Cal. 112; State *v.* Ferris, 42 Conn. 560.

[7] Mitchell *v.* Beckman, 64 Cal. 117; Agricultural Bank *v.* Wilson, 24 Me. 273. See Henkle *v.* Salem Manf. Co., 39 Ohio St. 547.

[8] Mitchell *v.* Beckman, 64 Cal. 117; Mathis *v.* Pridham, 1 Tex. Civ. App. 58, 20 S.W. R. 1015; Fulgam *v.* Macon, etc., R. Co., 44 Ga. 597; Crumlish *v.* Shenandoah Valley R. Co., (W. Va.) 22 S. E. R. 90.

[9] Vail *v.* Upton, 85 N. Y. 453, 20 Hun 355.

[10] As to the effect of such a blank indorsement, see Fraser *v.* Charleston, 11 S. C. 486; Leavitt *v.* Fisher, 4 Duer (N. Y.) 1. As to the other modes of transfer see Cook on Stock and Stockholders, § 375. Under the law of Massachusetts, shares of stock may be effectually transferred by delivery of the certificate with a power of attorney to transfer the same on the books of the company, signed in blank. Andrews *v.* Worcester, etc., R. Co., 159 Mass. 64.

[11] Walker *v.* Detroit Transit, etc., Co., 47 Mich. 338. That it is only a convenient evidence of the holder's title, see Johnson *v.* Albany, etc., R. Co., 40 How. Prac. (N. Y.) 193; Cincinnati, etc., R. Co. *v.* Pearce, 28 Ind. 502; Slipher *v.* Earhart, 83 Ind. 173.

[12] Johnson *v.* Albany, etc., R. Co., 40 How. Prac. (N. Y.) 193; Buffalo, etc., R. Co. *v.* Dudley, 14 N. Y. 336,

of the company are the final evidence of who are stockholders,[1] and a certificate, apart from the ownership of the shares it represents, may be said to be worthless.[2]

§ 79. Certificates — How far negotiable—Shares are personal property.—It follows, from what has been stated, that such certificates are not strictly negotiable,[3] but the shares which they represent may be sold[4] as any other personal property,[5] and the certificates will pass as incident to the shares. But holders of stock who transfer the certificates by indorsement in blank or by delivery when so indorsed, and corporations who issue certificates[6] which state that the shares are fully

347; Chester Glass Co. *v.* Dewey, 16 Mass. 94; Rio Grande, etc., Co. *v.* Burns, 82 Tex. 50, 17 S. W. R. 1043; National Bank *v.* Watsontown Bank, 105 U. S. 217; 1 Morawetz Priv. Corp., § 472.

[1] New Hampshire Central R. Co. *v.* Johnson, 30 N. H. 390; Dows *v.* Naper, 91 Ill. 44; Morrill *v.* Little Falls, etc., Co., 53 Minn. 371, 21 L. R. A. 174; New Albany, etc., R. Co. *v.* McCormick, 10 Ind. 499. While between the parties a provision requiring the transfer of stock on the corporation books is inoperative, yet as against the corporation and others the assignment is imperfect and executory until perfected on the books of the corporation. Noble *v.* Turner, 69 Md. 519, s. c. 16 Atl. R. 124; Topeka Mfg. Co. *v.* Hale, 39 Kan. 23, s. c. 17 Pac. R. 601.

[2] Payne *v.* Elliot, 54 Cal. 339.

[3] Mechanics' Bank *v.* New York, etc., R. Co., 13 N. Y. 599, 627; Sewall *v.* Boston Water-power Co., 86 Mass. 277; Shaw *v.* Spencer, 100 Mass. 382; Hammond *v.* Hastings, 134 U. S. 401; Clark *v.* American Coal Co., 86 Iowa 436, 53 N. W. R. 291; Knox *v.* Eden, etc., Co., (N. Y.) 42 N. E. R. 988.

[4] Stock may be sold on execution in nearly all the states.

[5] Nearly all of the states provide by statute that shares of stock shall be personal property. Stimson's Am. Stat. Law, § 8116. Such a provision is merely declaratory of the common law. Mohawk, etc., R. Co. *v.* Clute, 4 Paige Ch. 384, 393; 1 Cook on Stock and Stockholders, § 331. The rule is the same where all the corporate property is real estate. Baldwin *v.* Canfield, 26 Minn. 43. See generally, to the effect that shares are personal property, Seward *v.* Rising Sun, 79 Ind. 351, s. c. 13 Am. & Eng. R. R. Cas. 315; Cooper *v.* Corbin, 105 Ill. 224, s. c. 13 Am. & Eng. R. R. Cas. 394; Berney Nat. Bank *v.* Pinckard, 87 Ala. 577, s. c. 30 Am. & Eng. Corp. Cas. 52; Allen *v.* Pegram, 16 Iowa 163; Tregear *v.* Etiwanda Water Co., 76 Cal. 537, s. c. 9 Am. St. R. 245; Weaver *v.* Barden, 49 N. Y. 286.

[6] Where spurious and fraudulent certificates of stock are issued by the officers of a corporation under its seal and their genuineness affirmed by such officers in answer to inquiries from an intending purchaser, the corporation is liable on such certificates to a *bona fide* purchaser for value. Fifth Ave. Bank *v.* Forty-second St., etc., R. Co., 137 N. Y. 231; Mutual Life Ins. Co. *v.* Forty-second St., etc.,

paid up and which contain no notice of the claims of the corporation[1] are held so far estopped[2] by the apparent ability to

R. Co., 74 Hun (N. Y.) 505; Citizens' Nat. Bk. *v.* Cincinnati, etc., R. Co., (Cin. Super.Ct.) 29 Wkly. Law Bul. 15. See Ryder *v.* Bushwick R. Co., 134 N. Y. 83. But where the certificates were issued in pursuance of a fraudulent scheme to which the assignor was a party, the assignee acquires no rights superior to those of his assignor. Brown *v.* Duluth, etc., R. Co., 53 Fed. R. 889.

[1] Where no lien upon shares is given to the company by the charter or by a general law for debts or unpaid calls due the company, the certificate should contain a reference to its claims so as to notify all purchasers. 1 Morawetz on Priv. Corp. (2d ed.), § 203. Where the certificate states that it represents paid-up stock, the corporation can not deny that fact after it has passed into the hands of a *bona fide* purchaser. Steacy *v.* Little Rock, etc., R. Co., 5 Dill. (U. S.) 348; Young *v.* Erie Iron Co., 65 Mich. 111, 31 N. W. R. 814; 1 Cook on Stock and Stockholders, § 50. And it seems that the purchaser may assume that stock is paid up, when he purchases in the open market, in the absence of anything to give him notice to the contrary, and he will be protected. Foreman *v.* Bigelow, 4 Cliff. (U. S.) 508; Dupont *v.* Tilden, 42 Fed. R. 87; Cleveland, etc., Co. *v.* Texas, etc., R. Co., 27 Fed. R. 250; Keystone Bridge Co. *v.* McCluney, 8 Mo. App. 496; West Nashville, etc., Co. *v.* Nashville Sav. Bank, 86 Tenn. 252, 6 S. W. R. 340; Cook on Stock and Stockholders, §§ 50, 257. *Contra*, Meyers *v.* Seeley, 10 Nat. Bank Reg. 411. Certificates of stock ordinarily contain no representations as to whether any equities attach to the shares which they represent, and it is said that a certificate of stock is not negotiable paper and whoever takes it takes it subject to its equities and burdens, and it is not necessary that the certificate contain a statement of the limitations and burdens which the law casts upon all such paper. The omission of such a statement is not a waiver by the corporation of the benefits thereof; and, though the purchaser be ignorant of such equities and burdens, his ignorance does not enable him to hold the paper discharged therefrom. Wherever such paper is issued, under authority granted by general statute, whoever deals with that paper is charged with notice of all limitations and burdens attached to it by such statute, whether the party lives in or out of the state. Hammond *v.* Hastings, 134 U. S. 401, 10 Sup. Ct. R. 727; Hollins *v.* St. Paul, etc., R. Co., 29 N. Y. S. R. 208; Craig *v.* Hesperia, etc., Co., 45 Pac. R. 10.

[2] Even though certificates are altogether spurious, the company issuing them can be compelled to indemnify one who purchases them in good faith from the person to whom it issued them. Kisterbock's Appeal, 127 Pa. 601. The corporation will be estopped to deny that stock is fully paid after certificates which were paid in property that the corporation was authorized to take in payment for stock have passed into the hands of *bona fide* purchasers, although the property was overvalued. Dupont *v.* Tilden, 42 Fed. R. 87. In Farrington *v.* South Boston R. Co., 150 Mass. 406, 7 R. R. & Corp. L. J. 196, 5 L. R. A. 849, the court says: "We think it is a safer and more reasonable rule to hold that a person taking on pledge a

convey a good title to the shares which their acts have conferred upon the holder of the certificates,[1] that such certificates are said to possess *quasi* negotiability.[2] Where, however, a corporation is organized under a public law which provides that the corporation shall have a lien upon all the stock or property of its members invested therein for any indebtedness of such members to the corporation, such law is notice to the world; and, in the absence of any representations as to such lien on the part of the corporation, a purchaser of such stock will take it subject to such lien.[3]

§ 80. **New certificates in place of lost—Fraud.**—"A bond of indemnity may be required by a corporation as a condition of issuing new certificates of stock for those that have been lost, where the owner is an assignee and has never had possession of the old certificates, and the lapse of time is not so great as to preclude danger of their reappearance."[4] A purchaser

certificate of stock newly issued in his name by an officer of a corporation as security for the private debt of the officer should be required to investigate the title to the stock if the officer is one who has the power, either alone or with others, to issue stock certificates, than to hold that such a person can rely upon a certificate so issued to him in the absence of actual notice or knowledge that it has been fraudulently issued."

[1] McNeil *v.* Tenth Nat. Bank, 46 N. Y. 325; Tayler *v.* Great Indian, etc., R. Co., 4 DeG. & J. 559; Walker *v.* Detroit Transit R. Co., 47 Mich. 338, 347; Cook's Stock and Stockholders, § 416; Morawetz on Priv. Corp. (2d ed.), § 190. The English courts, however, refuse to follow the American rule as to the *quasi* negotiability of certificates even where they are issued by an American corporation. Colonial Bank *v.* Cady, 63 L. T. R. 27.

[2] Daniel on Negotiable Instruments, § 1708. An owner of stock who permitted a certificate to be issued to another for stock which he had transferred to such other person without consideration, and who takes a blank assignment of such certificate, can hold the stock as against an attaching creditor of that other person. Andrews *v.* Worcester, etc., R. Co., 159 Mass. 64. They have, however, been held to be so far non-negotiable instruments that a *bona fide* purchaser of such certificates standing on the company's books in the name of the former owner, regularly indorsed by him in blank, and stolen from the present owner without his fault, gets no title. East Birmingham Land Co. *v.* Dennis, 85 Ala. 565, 5 R. R. & Corp. L. J. 296, 2 L. R. A. 836.

[3] Hammond *v.* Hastings, 134 U. S. 401, s. c. 10 Sup. Ct. R. 727.

[4] Guilford *v.* Western U. Tel. Co., 43 Minn. 434, 46 N. W. R. 70. Where, on application to a company to register a transfer of stock, the company sent a letter giving notice of it to the

of corporate stock receiving new certificates therefor, signed by the proper officers, although issued through their fraud, is, if he acts in good faith, and without notice, entitled to be protected as a *bona fide* purchaser. He owes no duty, ordinarily, to the corporation to see to it that the seller surrenders any old certificates and transfers them on the books of the corporation,[1] and the corporation may be held liable to damages for the fraud of its officers in issuing such stock, where it can not be compelled to issue valid shares in place of those fraudulently issued for the reason that this would cause an overissue of its capital stock.[2] On the other hand, it has been held that if a purchaser exhibits to the corporation a forged assignment of stock, and thus obtains a new certificate which he sells he may become liable to the corporation which he has deceived by impliedly representing that the signature is genuine,[3] and it has also been held that one who receives stock from an agent to secure the agent's own private debt, knowing that the surrender of the old certificate is a prerequisite to the issue of the new, without making any inquiry as to whether it has been surrendered, is not a *bona fide* purchaser and can not hold the

holder of stock on the register, and stating that, unless she advised them to the contrary, the stock would be transferred in their books; and she failed to answer the letter; and the company subsequently registered the transfer,—she was held not estopped from showing that her signature to the transfer was a forgery, and demanding to have her name replaced on the register as holder of the stock. Barton *v.* London & N. W. R. Co., L. R. 24 Q. B. D. 77. See, also, Galveston City Co. *v.* Sibley, 56 Tex. 269; Butler *v.* Glen Cove Starch Co., 18 Hun (N. Y.) 47.

[1] Allen *v.* South Boston R. R. Co., 150 Mass. 200, s. c. 5 L. R. A. 716, 22 N. E. R. 917, 15 Am. St. R. 185. See, also, Salisbury Mills *v.* Townsend, 109 Mass. 115; American Wire Nail Co. *v.* Bayless, 91 Ky. 94; New York & N. H. R. R. Co. *v.* Schuyler, 34 N. Y. 30. But see Moores *v.* Citizens' Nat. Bank, 111 U. S. 156, s. c. 4 Sup. Ct. R. 345. This case is severely criticised in 29 Alb. Law Jour. 364, and in Lowell on Transfer of Stock, § 112, n. 2.

[2] New York, N. H., etc., R. R. Co. *v.* Schuyler, 34 N. Y. 30; Titus *v.* Great Western, etc., Co., 61 N. Y. 237; Bridgeport Bank *v.* N. Y., etc., R. R. Co., 30 Conn. 231; Cleveland, etc., R. R. Co. *v.* Robbins, 35 Ohio St. 483; Kisterbochs' Appeal, 127 Pa. St. 601, s. c. 14 Am. St. R. 868; Tome *v.* Parkersburg R. R. Co., 39 Md. 36, s. c. 17 Am. R. 540; Supply Ditch Co. *v.* Elliott, 10 Colo. 327, s. c. 3 Am. St. R. 586; Western Un. Tel. Co. *v.* Davenport, 97 U. S. 369; Western Md. R. R. Co. *v.* Franklin Bank, 60 Md. 36.

[3] Boston & A. R. R. Co. *v.* Richardson, 135 Mass. 473.

corporation liable in damages.[1] The issue of new certificates of stock in place of other certificates, properly issued, which have been lost does not, however, constitute an overissue of stock.[2]

§ 81. **Preferred stock.**—Preferred stock is usually issued in exchange for common stock as an inducement for the shareholders to advance money to meet certain exigencies which arise in prosecuting the corporate enterprises; or as security to the holders of stock in the more prosperous of two consolidating companies; or in exchange for mortgage bonds of the corporation.[3] It has been held that it can not be issued to raise money to pay a dividend on the common stock.[4] To induce investors to take the stock it is usually provided that the holder shall be entitled to payment of a certain dividend out of the accrued profits not necessary for the operation of the road or for repairs,[5] or reasonable improvements,[6] before dividends are paid

[1] Farrington *v.* South Boston R. R. Co., 150 Mass. 406, s. c. 15 Am. St. R. 222. See, also, Moores *v.* Citizens' Nat. Bank, 111 U. S. 156, s. c. 4 Sup. Ct. R. 345; Hall *v.* Rose Hill, etc., Co., 70 Ill. 673; Seligson *v.* Brown, 61 Tex. 114, s. c. 10 Am. & Eng. Corp. Cas. 143.

[2] Allen *v.* South B. R. Co., 150 Mass. 200, 22 N. E. R. 917, 5 L. R. A. 716.

[3] A mortgagee who exchanges his bonds for preferred stock is no longer a creditor, but becomes a stockholder, with a stockholder's rights and liabilities. St. John *v.* Erie R. Co., 22 Wall. (U. S.) 136. His claims are subject to all mortgages executed before or after his stock was issued. King *v.* Ohio, etc., R. Co., 12 Chi. Leg. News 219, s. c. 2 Fed. R. 36; Warren *v.* King, 108 U. S. 389. It seems, however, that, as it is not against public policy and amounts virtually to a mere contract on the part of the stockholders as to how they shall divide the profits, they may agree in the beginning and provide in the by-laws for the classification of the stock into common and preferred, even where the statute is silent upon the subject. *Re* South, etc., Brewery Co., L. R. 31 Ch. Div. 261; Kent *v.* Quicksilver Mining Co., 78 N. Y. 159; Lindley on Companies, 396; 1 Cook on Stock and Stockholders, § 268. But see Guinness *v.* Land Corp., L. R. 22 Ch. Div. 349; Ashbury *v.* Watson, L. R. 30 Ch. Div. 376, s. c. 16 Am. & Eng. Corp. Cas. 383.

[4] Hoole *v.* Great Western R. Co., L. R. 3 Ch. 262.

[5] It has been held that earnings should go toward the payment of a floating debt in preference to the payment of dividends on the preferred stock. Chaffee *v.* Rutland R. Co., 55 Vt. 110. See Belfast, etc., R. Co. *v.* Belfast, 77 Me. 445. But as to the payment of a debt not yet due, see Hazeltine *v.* Belfast, etc., R. Co., 79 Me. 411.

[6] New York, etc., R. Co. *v.* Nickals,

to the holders of common stock,[1] and this is the reason it is called preferred stock.

§ 82. When preferred stock may be issued.—Rights and remedies of dissenting stockholders.—Such stock can only be issued where the power to issue it is conferred by charter or by statute,[2] unless it is issued by agreement of all the stockholders.[3] A stockholder may, however, waive objections to such an issue, and long acquiescence will be construed to be such a waiver.[4] "A privilege given by a railroad company to its stock-

119 U. S. 296, reversing 15 Fed. R. 575, where it was held that payment of dividends could be enforced before the improvements contemplated were made.

[1] Totten *v.* Tison, 54 Ga. 139; Chaffee *v.* Rutland R. Co., 55 Vt. 110; Henry *v.* Great Northern, etc., R. Co., 4 Kay & J. (Eng. Ch.) 1; Boardman *v.* Lake Shore, etc., R. Co., 84 N. Y. 157; Prouty *v.* Michigan, etc., R. Co., 1 Hun (N. Y.) 655; Bates *v.* Androscoggin, etc., R. Co., 49 Me. 491; Cook on Stock and Stockholders, § 270.

[2] Sturge *v.* Eastern, etc., R. Co., 7 DeG., M. & G. 158; Williston *v.* Michigan, etc., R. Co., 95 Mass. 400; Bard *v.* Banigan, 39 Fed. R. 13; Kent *v.* Quicksilver Mining Co., 78 N. Y. 159; Campbell *v.* American, etc., Co., 122 N. Y. 455, s. c. 25 N. E. R. 853. The power will not be extended by implication. Covington, etc., Co. *v.* Sargent, 1 Cin. Super. Ct. 354; Melhado *v.* Hamilton, 28 L. T. (N. S.) 578, 29 L. T. (N. S.) 364; Harrison *v.* Mexican R. Co., L. R. 19 Eq. Cas. 358. Power granted to a railroad company to do all the lawful acts incident to its corporate existence, with "such additional powers as may be convenient for the due and successful execution of the powers granted," does not authorize it to guarantee a specific dividend on its stock, as a premium to induce a subscription, even though the guaranty be partly in consideration of services rendered the company. Elevator Co. *v.* Memphis & C. R. Co., 85 Tenn. 703, 4 Am. St. R. 798, 5 S. W. R. 52.

[3] Harrison *v.* Mexican R. Co., 44 L. J. (Ch.) 403; Kent *v.* Quicksilver Mining Co., 78 N. Y. 159, 178; Higgins *v.* Lansingh, 154 Ill. 301, s. c. 40 N. E. R. 362. Some cases have held that under a power to increase the capital stock and to borrow money such stock could be issued by a majority vote. Hazlehurst *v.* Savannah, etc., R. Co., 43 Ga. 13 (1875); Rutland, etc., R. Co. *v.* Thrall, 35 Vt. 536 (1863); West Chester, etc., R. R. Co. *v.* Jackson, 77 Pa. St. 321; Gordon *v.* Richmond, etc., R. R. Co., 78 Va. 501, s. c. 22 Am. & Eng. R. R. Cas. 33. But this has been denied. Kent *v.* Quicksilver Mining Co., 78 N. Y. 159. It has been held that the power to issue preferred stock is given by the grant of a right to raise funds by a sale of stock. Chaffee *v.* Rutland, etc., R. Co., 55 Vt. 110, s. c. 16 Am. & Eng. R. R. Cas. 408. See, also, State *v.* Cheraw, etc., R. Co., 16 S. C. 524.

[4] Hoyt *v.* Quicksilver Mining Co., 17 Hun (N. Y.) 169; Kent *v.* Quicksilver Min. Co., 78 N. Y. 159; Taylor *v.* South, etc., R. Co., 13 Fed. R. 152; Branch *v.* Atlantic, etc., R. Co., 3 Woods (U. S.) 481. See Banigan

holders to exchange common stock for preferred stock must be exercised within a reasonable time, and a tender of common stock and the additional sum required for an exchange, made thirty-three years after the privilege was conferred, is not made within a reasonable time."[1] It has been held that the directors can not issue such stock under an authorization to the corporation to do so,[2] but this decision seems of doubtful soundness, and, in any event, such an issue is susceptible of ratification by a subsequent vote of the stockholders.[3] A dissenting stockholder may enjoin an unauthorized issue of preferred stock,[4] or may have it set aside by suit brought within a reasonable time.[5]

§ 83. **Holder of preferred stock not a creditor—His rights and remedies.**—The holder of preferred stock is not a creditor of the corporation,[6] but simply a shareholder with a superior

v. Bard, 134 U. S. 291, s. c. 10 Sup. Ct. R. 565; Lockhart *v.* Van Alstyne, 31 Mich. 76, s. c. 18 Am. R. 156, 163; Hazlehurst *v.* Savannah, etc., R. R. Co., 43 Ga. 13, and compare American Tube Works *v.* Boston, etc., Co., 139 Mass. 5; National Bank *v.* Drake, 29 Kas. 311.

[1] Holland *v.* Cheshire R. Co., 151 Mass. 231, s. c. 8 R. R. & Corp. L. J. 49, 24 N. E. R. 206. See, also, Pearson *v.* London, etc., Ry. Co., 14 Sim. 541.

[2] McLaughlin *v.* Detroit, etc., R. Co., 8 Mich. 99.

[3] McLaughlin *v.* Detroit, etc., R. Co., 8 Mich. 99.

[4] Sturge *v.* Eastern R. Co., 7 DeG., M. & G. 153; Moss *v.* Syers, 32 L. J. Ch. 711; Hutton *v.* Scarborough, etc., Co., 4 DeG., J. & S. 672; Kent *v.* Quicksilver, etc., Co., 78 N. Y. 159.

[5] A long delay in bringing suit or other acquiescence may confirm the issue. Taylor *v.* South, etc., R. Co., 4 Woods (U. S.) 575, 13 Fed. R. 152 (10 years); Kent *v.* Quicksilver Mining Co., 78 N. Y. 159 (4 years); Banigan *v.* Bard, 134 U. S. 291; Hazlehurst *v.* Savannah, etc., R. Co., 43 Ga. 13. One accepting such stock can not question its validity in a suit for the purchase price, if the other stockholders do not complain. Evansville, etc., R. Co. *v.* City of Evansville, 15 Ind. 395, 415. See, also, Branch *v.* Jesup, 106 U. S. 468. But compare Reed *v.* Boston, etc., Co., 141 Mass. 454, s. c. 5 N. E. R. 852; Anthony *v.* Household, etc., Co., 16 R. I. 571, s. c. 18 Atl. R. 176, 5 L. R. A. 575.

[6] Belfast, etc., R. Co. *v.* Belfast, 77 Me. 445; Chaffee *v.* Rutland, etc., R. Co., 55 Vt. 110; Warren *v.* King, 108 U. S. 389; Taft *v.* Hartford, etc., R. Co., 8 R. I. 310; Bailey *v.* Railroad Co., 1 Dill. (U. S.) 174; Birch *v.* Cropper, 61 L. T. R. 621; Field *v.* Lamson, etc., Co., 162 Mass. 388, s. c. 27 L. R. A. 136, and note. But see Emerson *v.* New York, etc., R. R. Co., 14 R. I. 555, s. c. 16 Am. & Eng. R. R. Cas. 404; Burt *v.* Rattle, 31 Ohio St. 116.

right to receive dividends when the profits are insufficient to pay them to all the holders of stock,[1] and he can claim the payment of dividends only out of the net earnings.[2] The ownership of such stock usually confers upon the holder a right to vote it at meetings of the shareholders; but it has been held competent for a railroad company, in issuing certificates of preferred stock, to stipulate therein that the holders shall not have or exercise the right to vote as stockholders at such meetings.[3] The directors may be compelled by suit to pay dividends on preferred stock before otherwise disposing of net earnings,[4] subject to a reasonable discretion on their part as to making improvements,[5] and, possibly, as to the liquidation of a floating debt,[6] yet no suit can be maintained, as a rule, against the corporation for a preferred dividend until profits with which to

[1] Bates *v.* Androscoggin, etc., R. Co., 49 Me. 491; Taft *v.* Hartford, etc., R. Co., 8 R. I. 310; Warren *v.* King, 108 U. S. 389; St. John *v.* Erie R. Co., 22 Wall. (U. S.) 136; Chaffee *v.* Rutland, etc., R. Co., 55 Vt. 110; State *v.* Cheraw, etc., R. R. Co., 16 S. C. 524. Held subject to the statutory liability of a stockholder in Railroad Co. *v.* Smith, 48 Ohio St. 219.

[2] Belfast, etc., R. R. Co. *v.* Belfast, 77 Me. 445; Lockhart *v.* Van Alstyne, 31 Mich. 76; Henry *v.* Great Northern, etc., R. R. Co., 1 De Gex & J. 606; Elkins *v.* Camden, etc., R. Co., 36 N. J. Eq. 233; Miller *v.* Ratterman, 47 Ohio St. 141, s. c. 24 N. E. R. 496. But see Cotting *v.* New York, etc., R. Co., 54 Conn. 156; Totten *v.* Tison, 54 Ga. 139. As to what are net earnings, see St. John *v.* Erie R. R. Co., 10 Blatchf. (U. S.) 271, affirmed in 22 Wall. 136; Warren *v.* King, 108 U. S. 389, 398; Van Dyck *v.* McQuade, 86 N. Y. 38; Phillips *v.* Eastern R. R. Co., 138 Mass. 122; Union Pac. R. R. Co. *v.* United States, 99 U. S. 402.

[3] Miller *v.* Ratterman, 47 Ohio St. 141, 24 N. E. R. 496.

[4] Boardman *v.* Lake Shore, etc., R. Co., 84 N. Y. 157, 180; Bailey *v.* Hannibal, etc., R. Co., 1 Dill. (U. S.) 174; Bates *v.* Androscoggin, etc., R. Co., 49 Me. 491; Barnard *v.* Vermont, etc., R. Co., 89 Mass. 512; Hazeltine *v.* Belfast, etc., R. R. Co., 79 Me. 411, s. c. 1 Am. St. R. 330; Mackintosh *v.* Flint, etc., R. R. Co., 32 Fed. R. 350; Dickinson *v.* Chesapeake, etc., R. R. Co., 7 W. Va. 390.

[5] New York, etc., R. Co. *v.* Nickals, 119 U. S. 296. It is suggested that where arrears are not collectible the corporation should not be allowed to retain profits for the making of improvements before paying dividends on preferred stock, as such power would give the corporation an opportunity to defeat the preference by waiting to declare a dividend until the profits sufficed for dividends on all the capital stock. 1 Cook on Stock and Stockholders, § 272.

[6] Chaffee *v.* Rutland, etc., R. Co., 55 Vt. 110; Belfast, etc., R. Co. *v.* Belfast, 77 Me. 445. See Hazeltine *v.* Belfast, etc., R. Co., 79 Me. 411, 30 Am. & Eng. R. Cas. 528.

pay it have accrued and it has been declared.[1] But if such accrued profits be appropriated to the payment of dividends on common stock while the guaranteed dividends on preferred stock remain unpaid, payment of such common dividends may be enjoined.[2] Or, if the payment is actually made, the holder of preferred stock is entitled to interest on his accrued dividends from the date of this misappropriation.[3] If from a lack of net profits with which to pay the guaranteed dividends upon preferred stock they should remain unpaid for a time, the holders are entitled to payment of arrears before any dividends are declared on common stock,[4] unless different provision is made by statute or otherwise.[5]

§ 84. **Rights of preferred stockholders after payment of guaranteed dividend—Future dividends.**—After the holders of preferred stock have received the dividend guaranteed to them, the net profits remaining on hand may be devoted to the payment of dividends on the common stock alone, until the holders

[1] Taft *v.* Hartford, etc., R. Co., 8 R. I. 310; Lockhart *v.* Van Alstyne, 31 Mich. 76; Webb *v.* Earle, L. R. 20 Eq. 556. The declaration of such a dividend is very largely within the discretion of the directors as long as they act in good faith. Field *v.* Lamson, 162 Mass. 388, s. c. 27 L. R. A. 136, and note.

[2] Union Pac. R. Co. *v.* United States, 99 U. S. 402; Taft *v.* Hartford, etc., R. Co., 8 R. I. 310; Prouty *v.* Michigan Southern, etc., R. R. Co., 1 Hun (N. Y.) 655.

[3] Prouty *v.* Michigan, etc., R. Co., 1 Hun (N. Y.) 655; Henry *v.* Great Northern R. Co., 4 K. & J. 1. See, also, Boardman *v.* Lake Shore, etc., R. R. Co., 84 N. Y. 157, s. c. 4 Am. & Eng. R. R. Cas. 265.

[4] Bailey *v.* Hannibal, etc., R. Co., 1 Dillon (U. S.) 174, 17 Wall. (U. S.) 96; Elkins *v.* Camden, etc., R. Co., 36 N. J. Eq. 233; Boardman *v.* Lake Shore, etc., R. Co., 84 N. Y. 157; Henry *v.* Great Northern R. Co., 1 DeG. & J. 606 (1857); Matthews *v.* Great Northern, etc., R. Co., 28 L. J. Chan. 375 (1859). But see *contra* Belfast, etc., R. Co. *v.* Belfast, 77 Me. 445; Gordon *v.* Richmond, etc., R. Co., 78 Va. 501.

[5] See Dent *v.* London, etc., Co., L. R. 16 Ch. Div. 344; Belfast, etc., R. Co. *v.* Belfast, 77 Me., 445, where a by-law was held to have controlling influence. See Companies Clauses, act of 1863, 26 and 27 Vict., Ch. 16, § 14, for statute provision limiting the fund for the payment of preferred dividends to the profits of the current year. See Stimson's Am. Stat. (1892), § 8620, for statutes of Indiana, Michigan, Iowa, Minnesota, Missouri, and Montana, providing that the terms and conditions of payment of preferred stock shall be prescribed by the directors or by the company, at the time it is issued.

of such stock have received a dividend equal to that paid on the preferred stock, after which all stock shares equally in any additional dividends which the net earnings on hand may suffice to pay.[1] The preferred shareholders are not entitled to have the profits reserved to pay their dividends which may accrue in the future. An assignment of the stock carries with it all arrears of dividends,[2] not expressly separated and reserved to the grantor,[3] unless the dividend has been declared before the transfer.[4]

§ 85. **Rights of preferred stockholders on dissolution.** — Unless a preference in repayment of capital invested has been specially contracted for[5] or is given by statute,[6] the holder of preferred stock shares equally with common shareholders in a distribution of assets upon dissolution.[7] His claims are subject to those of creditors for debts contracted subsequently to the issue of his stock.[8] This results from the rule that he is a stockholder and not a creditor.[9]

§ 86. **Guaranteed, interest-bearing, income and debenture stock.**—An agreement on the part of the corporation to pay a specified dividend or interest on its stock absolutely and at all

[1] Bailey *v.* Hannibal, etc., R. Co., 1 Dillon (U. S.) 174, 17 Wall. (U. S.) 96; Allen *v.* Londonderry, etc., R. R. Co., 25 W. R. 524.

[2] Manning *v.* Quicksilver Min. Co., 24 Hun 360; Hyatt *v.* Allen, 56 N. Y. 553.

[3] Jermain *v.* Lake Shore, etc., R. Co., 91 N. Y. 483.

[4] City of Ohio *v.* Cleveland, etc., R. Co., 6 Ohio St. 489.

[5] *Re* Bangor, etc., Co., L. R. 20 Eq. 59; *Re* Bridgewater Nav. Co., L. R. 39 Ch. Div. 1, s. c. 58 L. T. R. 476, 26 Am. & Eng. Corp. Cas. 386.

[6] McGregor *v.* Home Ins. Co., 33 N. J. Eq. 181.

[7] McGregor *v.* Home Ins. Co., 33 N. J. Eq. 181; *Re* Bridgewater Nav. Co., 58 L. T. R. 476; Griffith *v.* Paget, L. R. 6 Ch. Div. 511; Birch *v.* Cropper, 61 L. T. R. 621. But see Gordon *v.* Richmond, etc., R. R. Co., 78 Va. 501, s. c. 22 Am. & Eng. R. R. Cas. 33. So, when the capital stock is reduced the preferred stock may be reduced equally with the common. *Re* Barrow, etc., Co., 59 L.T. R. 500; *Re* Great Western, etc., Co., 56 L. J. Ch. 3; Bannatyne *v.* Direct, etc., Co., 55 L. T. R. 716. Unless it is preferred as to assets as well as dividends. *Re* Quebrada Ry., 60 L.T. R. 482. But see *Re* American Pastoral Co., 62 L. T. R. 625.

[8] Warren *v.* King, 108 U. S. 389, s. c. 2 Sup. Ct. R. 789; St. John *v.* Erie Ry. Co., 22 Wall. (U. S.) 136; King *v.* Ohio, etc., R. Co., 2 Fed. R. 36; Birch *v.* Cropper, 61 L. T. R. 621.

[9] See *ante*, § 83.

events, whether any profits are earned or not, would be contrary to public policy and void,[1] and it has been held that a railroad company can not, without legislative authority, contract to pay interest on its stock before the road is completed or any income received.[2] But in Massachusetts, the statute provides for "special stock," upon which a semi-annual dividend or interest is payable absolutely and as a debt, without regard to the corporate earnings,[3] and, even in the absence of express legislative authority, a corporation has the same power to

[1] Lockhart *v.* VanAlstyne, 31 Mich. 76, s. c. 18 Am. R. 156; State *v.* Cheraw, etc., R. Co., 16 S. C. 524; Crawford *v.* Northeastern, etc., R. Co., 3 Jur. (N. S.) 1093; Ohio College *v.* Rosenthal, 45 Ohio St. 183, s. c. 12 N. E. R. 665; Chase *v.* Vanderbilt, 62 N. Y. 307; Elevator Co. *v.* Memphis, etc., R. R. Co., 85 Tenn. 703, s. c. 4 Am. St. R. 798, 5 S. W. R. 52.

[2] Painesville, etc., R. R. Co. *v.* King, 17 Ohio St. 534. See, also, Troy, etc., R. Co. *v.* Tibbits, 18 Barb. (N. Y.) 297; Pittsburg, etc., R. Co. *v.* Allegheny Co., 63 Pa. St. 126. But we believe that a railroad company ordinarily has power, for the purpose of getting subscriptions and money to build the road, to issue interest-bearing stock or to agree to pay interest until the road is built or until some other designated time, at least where the interest, although accrued, is not to be paid until the road is in operation and sufficient profits are made. Thus, in the case of Evansville, etc., R. R. Co. *v.* City of Evansville, 15 Ind. 395, 415, the court said: "The work of constructing a railroad sometimes requires years for its completion, and dividends to stockholders seldom, if ever, accrue before the road is fully completed. If interest were not allowed upon the stock, those who invest their funds at the beginning would receive nothing more than those who take their stock when the work may be nearly completed. We see nothing against the law or public policy in this arrangement. The construction of a railroad requires a large outlay of capital, much of which must be furnished before the work can progress to any considerable extent. If interest is allowed on the stock from the time it is paid for, there is an inducement for capitalists to invest early and furnish the means to successfully carry on the enterprise." To the same effect are the decisions in Richardson *v.* Vermont, etc., Co., 44 Vt. 613, 618; Rutland, etc., Co. *v.* Thrall, 35 Vt. 536; Wright *v.* Vermont, etc., R. Corp., 12 Cush. 68; Milwaukee, etc., R. R. Co. *v.* Field, 12 Wis. 340; Barnard *v.* Vermont, etc., R. R. Co., 7 Allen (Mass.) 512; Ohio *v.* Cleveland, etc., R. R. Co., 6 Ohio St. 489. See, also, People *v.* Preston, 140 N. Y. 549, s. c. 24 L. R. A. 57; Miller *v.* Pittsburgh, etc., R. R. Co., 40 Pa. St. 237, s. c. 80 Am. Dec. 570; Waterman *v.* Troy, etc., R. R. Co., 8 Gray (Mass.) 433.

[3] American Tube Works *v.* Boston, etc., Co., 139 Mass. 5; Reed *v.* Boston, etc., Co., 141 Mass. 454, s. c. 12 Am. & Eng. Corp. Cas. 153, 5 N. E. R. 852; Williams *v.* Parker, 136 Mass. 204, s. c. 6 Am. & Eng. Corp. Cas. 566.

guaranty dividends and provide for interest *out of the profits* that it has to issue preferred stock, for such guaranteed or interest-bearing stock is virtually preferred stock and nothing more.[1] It will generally be construed to mean that the interest or dividend is payable only out of the profits and upheld on that ground,[2] but much, of course, will necessarily depend upon the language used, and where the interest is guaranteed absolutely and the corporation also agrees to liquidate the principal at a specified time, or the like, so that the so-called stock is in reality an interest-bearing debenture the relation created thereby will be that of debtor and creditor and the holder will not be merely a shareholder as he would be if it were preferred or interest-bearing stock payable only out of the profits.[3] Its validity, therefore, would depend upon some other power than the power to issue preferred stock. Sometimes an agreement is made between two corporations whereby one guarantees to the other a certain specified annual dividend on its capital stock. Such an agreement is held to be a guarantee to the corporation and not to the stockholders severally, and the directors have power to modify the terms of such guaranty, and their action in so doing will not be disturbed by the courts where they have acted fairly and in good faith.[4]

[1] Taft *v.* Hartford, etc., R. R. Co., 8 R. I. 310, s. c. 5 Am. R. 575; Miller *v.* Ratterman, 47 Ohio St. 141, 24 N. E. R. 496; Henry *v.* Great Northern, etc., R. R. Co., 4 K. & J. 1. Except that the dividends are more clearly cumulative and more clearly show that the holder is entitled to arrears as soon as the profits are earned and the dividend declared. Boardman *v.* Lake Shore, etc., Ry. Co., 84 N. Y. 157; Henry *v.* Great Northern, etc., R. R. Co., 4 K. & J. 1.

[2] Lockhart *v.* VanAlstyne, 31 Mich. 76, s. c. 18 Am. R. 156; Taft *v.* Hartford, etc., R. R. Co., 8 R. I. 310, s. c. 5 Am. R. 575; Scott *v.* Central R. R. Co., 52 Barb. (N. Y.) 45; Waterman *v.* Troy, etc., R. R. Co., 8 Gray (Mass.) 433; Field *v.* Lamson, etc., Co., 162 Mass. 388, s. c. 27 L. R. A. 136, and note. See, also, Barnard *v.* Vermont, etc., R. R. Co., 7 Allen (Mass.) 512; Richardson *v.* Vermont, etc., R. R. Co., 44 Vt. 613.

[3] Burt *v.* Rattle, 31 Ohio St. 116; West Chester, etc., R. R. Co. *v.* Jackson, 77 Pa. St. 321; Totten *v.* Tison, 54 Ga. 139.

[4] Flagg *v.* Manhattan R. Co., 10 Fed. R. (U. S. C. C.) 413; Beveridge *v.* N. Y. El. R. R. Co., 112 N. Y. 1. A guarantee of a specified dividend upon the stock of another company absolutely and without regard to profits was held unauthorized and not enforceable in Memphis, etc., Co. *v.* Memphis, etc., R. R. Co., 85 Tenn. 703, s. c. 5 S. W. R. 52, 4 Am. St. R. 798.

§ 87. **Increase and reduction of capital stock.**—A corporation can neither increase nor reduce its fixed capital stock without legislative authority.[1] The power to increase it can not, ordinarily, be implied from the power to reduce it,[2] nor can the power to reduce it be implied from the mere power to increase it.[3] And when the statute confers the power to increase or decrease the capital stock the statutory method of procedure should be substantially followed.[4] Unless otherwise provided, the power so given can only be exercised by the stockholders, and not by the directors.[5] But the stockholders may be estopped by their acquiescence, in such a case, from questioning the legality of an increase or decrease made by the directors.[6] When the capital stock is increased new shares of stock are generally issued and sold, but the existing share-

[1] Spring Co. *v.* Knowlton, 103 U. S. 49; Scovill *v.* Thayer, 105 U. S. 143; Oldtown R. R. Co. *v.* Veazie, 39 Me. 571; Railway Co. *v.* Allerton, 18 Wall. (U. S.) 233; New York & N. H. R. R. Co. *v.* Schuyler, 34 N. Y. 30; Mechanics' Bank *v.* N. Y., etc., R. R. Co., 13 N. Y. 599, 617; Winters *v.* Armstrong, 37 Fed. R. 508. But the authorized issue of bonds convertible into stock may, in effect, amount to authority to increase the capital stock to that extent. Belmont *v.* Erie Ry. Co., 52 Barb. (N. Y.) 637; Ramsey *v.* Erie Ry. Co., 38 How. Pr. 193, 216. See, also, Van Allen *v.* Illinois Cent. R. R. Co., 7 Bosw. (N. Y.) 515.

[2] See Sutherland *v.* Olcott, 95 N. Y. 93; Lexington, etc., R. Co. *v.* Chandler, 13 Met. (Mass.) 311.

[3] Seignouret *v.* Home Ins. Co., 24 Fed. R. 332, s. c. 10 Am. & Eng. Corp. Cas. 131, 25 Am. L. R. 29; Sutherland *v.* Olcott, 95 N. Y. 93. See, also, Smith *v.* Goldsworthy, 4 Q. B. (1 Ad. & E. N. S.) 430.

[4] Spring Co. *v.* Knowlton, 103 U. S. 49; Knowlton *v.* Congress Spring Co., 57 N. Y. 518; Grangers', etc., Co. *v.* Kamper, 73 Ala. 325, s. c. 6 Am. & Eng. Corp. Cas. 497. *In re* Wheeler, 2 Abb. Pr. N. S. (N. Y.) 361; State *v.* McGrath, 86 Mo. 239. But see Handley *v.* Stutz, 139 U. S. 417, s. c. 34 Am. & Eng. Corp. Cas. 624. The general rule is that if the stock is an overissue so that there is an entire want of power the holder does not become a stockholder, and is not liable as such, but if there is power to issue it, mere informalities or irregularities will not vitiate it and one who receives it may become liable as a stockholder. This distinction is drawn in Scovill *v.* Thayer, 105 U. S. 143, where the authorities are reviewed and distinguished.

[5] Eidman *v.* Bowman, 58 Ill. 444, s. c. 11 Am. R. 90; Percy *v.* Millaudon, 9 La. 326 (6 Mart. N. S. 616), s. c. 7 Am. Dec. 196; Gill *v.* Balis, 72 Mo. 424. But see Sutherland *v.* Olcott, 95 N. Y. 93.

[6] Railway Co. *v.* Allerton, 18 Wall. (U. S.) 233; Payson *v.* Stoever, 2 Dill. (U. S.) 428; Sewell's Case, L. R. 3 Ch. 131.

holders, it seems, have the first right to take their proportionate part of the new stock,[1] although they have no right to demand a gratuitous distribution of it to them[2] and may lose their right to take precedence of other purchasers by failing to act within the time specified, or within a reasonable time.[3] The capital stock may also be increased, when authorized, by means of stock dividends.[4] The ordinary method of reducing the capital stock is by refunding to each stockholder a proportionate part of the surplus over and above the amount of the capital stock as reduced.[5] So, a corporation may effect a reduction by purchasing and cancelling its own shares, where it has authority to do so.[6] This, however, will not necessarily oper-

[1] Cunningham's Appeal, 108 Pa. St. 546; Jones *v.* Morrison, 31 Minn. 140; Gray *v.* Portland Bank, 3 Mass. 364, s. c. 3 Am. Dec. 156; Humboldt, etc., Ass'n *v.* Stevens, 34 Neb. 528, s. c. 52 N. W. R. 568, 33 Am. St. R. 654. It has, however, been questioned whether this rule applies to a railroad company existing independently of the stockholders with its economy and modes of action defined by statute. See Pierce on Railroads, 124; 1 Wood on Railroads, § 72. And it does not apply to old shares purchased by the corporation and reissued. State *v.* Smith, 48 Vt. 266; nor, it seems, to original shares of authorized stock remaining undisposed of. Curry *v.* Scott, 54 Pa. St. 270, 275.

[2] Miller *v.* Illinois, etc., R. R. Co., 24 Barb. (N. Y.) 312, 330; Brown *v.* Florida, etc., Ry. Co., 19 Fla. 472.

[3] Hart *v.* St. Charles St. R. R. Co., 30 La. Ann. Pt. 1, 758; Brown *v.* Florida, etc., Ry. Co., 19 Fla. 472. See, also, Sewall *v.* Eastern R. R. Co., 9 Cush. (Mass.) 5; Terry *v.* Eagle Lock Co., 47 Conn. 141.

[4] Beach on Private Corporations, § 477; 1 Cook on Stock and Stockholders, § 287; *post*, §§ 331, 338. In one sense, perhaps, a stock dividend does not increase the capital stock as the theory is that, while it may increase the number of shares, the aggregate interest of the stockholders is the same as before; in other words, it simply dilutes the existing shares to the extent that new shares are issued. Williams *v.* Western Un. Tel. Co., 93 N. Y. 162.

[5] Seeley *v.* New York Exchange Bank, 8 Daly (N. Y.) 400, affirmed in 78 N. Y. 608; Strong *v.* Brooklyn, etc., R. R. Co., 93 N. Y. 426; Currier *v.* Lebanon, etc., Co., 56 N. H. 262. But a stockholder in a bank which reduces its capital stock to the extent that its capital has become impaired on account of bad debts, to prevent an assessment upon the stockholders, can not compel a distribution of money afterwards realized on the "bad debts," as in case of a reduction where the capital is unimpaired. McCann *v.* First Nat. Bank, 112 Ind. 354.

[6] Taylor *v.* Miami, etc., Co., 6 Ohio 176; Chicago, etc., R. R. Co. *v.* Marseilles, 84 Ill. 145; State *v.* Smith, 48 Vt. 266; Williams *v.* Savage, etc., Co., 3 Md. Ch. 418; *Re* Gatling Gun, etc., 62 L. T. R. 312. See article in 8 So. Law Rev. U. S. 369; Tulare, etc., Dist. *v.* Kaweah, etc., Co., (Cal.) 44 Pac. R. 662.

ate as a reduction, unless so intended, for they may be resold and reissued.[1] And the mere power to reduce the capital stock does not authorize the corporation to purchase the shares of particular shareholders, over the objection of others, on such terms or in such a way as to benefit the former at the expense of the latter.[2] Nor is the "writing off" of a loss, which the corporation has suffered, such a reduction as is generally authorized.[3]

§ 88. **Watered stock.**—What is known as "watered stock" is fictitiously paid-up stock or stock which does not represent its face or par value in money or money's worth added to the assets of the corporation,[4] but which is issued as a bonus or exchanged for money, property, services,[5] or demands upon the company[6] of a less value than the par value of the stock.[7] Such issues of stock are frequently said to be contrary to public policy,[8] and a fraud upon those who take it as full paid

[1] Commonwealth *v.* Boston, etc., R. R. Co., 142 Mass. 146; City Bank *v.* Bruce, 17 N. Y. 507; Vail *v.* Hamilton, 85 N. Y. 453; Jefferson *v.* Burford, (Ky.) 17 S. W. R. 855; State Bank *v.* Fox, 3 Blatchf. (U S.) 431; Clapp *v.* Peterson, 104 Ill. 26; Bank *v.* Wickersham, 99 Cal. 655, s. c. 34 Pac. R. 444.

[2] Currier *v.* Lebanon, etc., Co., 56 N. H. 262; Chetlain *v.* Republic Life Ins. Co., 86 Ill. 220; Gill *v.* Balis, 72 Mo. 424. See, also, Pacific Fruit Co. *v.* Coon, (Cal.) 40 Pac. R. 542.

[3] *In re* Ebbw Vale, etc., Co., L. R. 4 Ch. Div. 832; Seignouret *v.* Home Ins. Co., 24 Fed. R. 332.

[4] Cook on Stock and Stockholders, § 28; Handley *v.* Stutz, 139 U. S. 417, 418.

[5] Capital stock to an amount far beyond the actual cost of the road is frequently issued to the construction company in payment for building it. Cyclopedia of Political Science, etc., Vol. III, page 527, cited in Cook on Stock and Stockholders, § 28.

[6] Such stock is frequently issued in the shape of a stock dividend when no corresponding amount has been added to the value of the company's property.

[7] Barnes *v.* Brown, 80 N. Y. 527, 534; Sturges *v.* Stetson, 1 Biss.(U. S.) 246; Tobey *v.* Robinson, 99 Ill. 222, 228; Oliphant *v.* Woodburn, etc., Co., 63 Iowa 332. But see Scovill *v.* Thayer, 105 U. S. 143; Lorillard *v.* Clyde, 86 N. Y. 384. Mere inflation, or gratuitous distribution of stock upon no increase of value in the corporate property, is condemned by law. Williams *v.* Western Union Tel. Co., 93 N. Y. 162.

[8] State *v.* Atchison, etc., R. Co., 24 Neb. 143; Morrow *v.* Iron, etc., Co., 87 Tenn. 262, s. c. 5 Ry. & Corp. L. J. 206; Sturges *v.* Stetson, 1 Biss.(U. S.) 246; Oliphant *v.* Woodburn Coal, etc., Co., 63 Iowa 332. *Quo warranto*

stock,[1] and are sometimes said to be cause for the forfeiture of the company's charter. In Louisiana the constitution provides that this penalty shall follow such action.[2]

§ 89. **Watered stock not absolutely void.** — The stock so issued is not, however, absolutely void, where it is not an overissue, even though there is a constitutional provision declaring fictitious issues void, if there is a consideration to support it, as where it is sold below par, or issued in payment for work or property of less than its face value.[3] But the stock, if issued gratuitously,[4] or such a proportion of it as will reduce the face value of the shares held to the sum paid for the stock,[5] may, it has been held, where it is sold below par, be at the suit of a dissenting stockholder,[6] recalled for cancellation, from the person to whom it is issued,[7] or from his grantee with notice,[8]

does not lie against a corporation in Minnesota merely because it issues its stock below par. State *v.* Minnesota, etc., Co., 40 Minn. 213, 41 N. W. R. 1020. But such an act is said to be clearly *ultra vires*. Fisk *v.* Chicago, etc., R. Co., 53 Barb. (N. Y.) 513. And it is held that a forfeiture may be decreed for *ultra vires* acts which are detrimental to the interests of the public. People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358; Commonwealth *v.* Delaware, etc., Canal Co., 43 Pa. St. 295; State *v.* People's, etc., Ass'n, 42 Ohio St. 579; People *v.* Improvement Co., 103 Ill. 491. See, also, Holman *v.* State, 105 Ind. 569, 5 N. E. R. 702. And the constitutions and laws of many of the states provide that railroad corporations shall not issue stock excepting for money or its equivalent actually received. Stimson's Am. Stat., § 452. See, also, Fitzpatrick *v.* Dispatch, etc., Co., 83 Ala. 604, s. c. 19 Am. & Eng. Corp. Cas. 423.

[1] Barnes *v.* Brown, 80 N. Y. 527.

[2] Const. La., § 238.

[3] Peoria R. Co. *v.* Thompson, 103 Ill. 187; Stein *v.* Howard, 65 Cal. 616; Gasquet *v.* Crescent City, etc., Co., 49 Fed. R. 496; Lorillard *v.* Clyde, 86 N. Y. 384; Memphis, etc., R. Co. *v.* Dow, 120 U. S. 287; *In re* Ambrose, etc., Co., L. R. 14 Ch. Div. 390, 394. But see New Castle, etc., R. Co. *v.* Simpson, 21 Fed. R. 533, 23 Fed. R. 214; Sturges *v.* Stetson, 1 Biss. (U. S.) 246; Fisk *v.* Chicago, etc., R. R. Co., 53 Barb. (N. Y.) 513.

[4] Gilman, etc., R. Co. *v.* Kelly, 77 Ill. 426.

[5] Sturges *v.* Stetson, 1 Biss. (U. S.) 246; Fosdick *v.* Sturges, 1 Biss. (U. S.) 255.

[6] Since each shareholder may insist that every other shareholder shall contribute his ratable part of the company's capital for the common benefit, he may maintain a suit to cancel an unauthorized issue of shares purporting to be paid-up, when they, in reality, are not. Morawetz on Priv. Corp. (2d ed.), §§ 275, 286.

[7] Gilman, etc., R. Co. *v.* Kelly, 77 Ill. 426.

[8] Upton *v.* Tribilcock, 91 U. S. 45; Boulton Carbon Co. *v.* Mills, 78 Iowa 460, 43 N. W. R. 290.

though not, it would seem, from a *bona fide* purchaser for value.[1] Participating stockholders[2] and their transferees with notice[3] are estopped to complain of the transaction,[4] as is the corporation itself, in the absence of fraud.

§ 90. **Rights of creditors and liabilities of holders of watered stock.**—But the creditors of the corporation may generally compel the persons receiving stock to pay the par value in full,[5] or such part thereof as may be necessary to pay their claims.[6] It is held, however, by the Supreme Court of

[1] 1 Cook on Stock and Stockholders, § 31.

[2] *In re* Gold Co., L. R. 11 Ch. Div. 701, 712; Scovill *v.* Thayer, 105 U. S. 143; Callanan *v.* Windsor, 78 Iowa 193, 42 N. W. R. 652; Wood *v.* Corry, etc., Co., 44 Fed. R. 146. Dissenting stockholders may have relief. Taylor *v.* Phila., etc., R. R. Co., 7 Fed. R. 381; Parsons *v.* Joseph, 92 Ala. 403, 8 So. R. 788; Perry *v.* Tuscaloosa, etc., Co., 93 Ala. 364, 9 So. R. 217. If they act promptly. Taylor *v.* South, etc., R. R. Co., 13 Fed. R. 152.

[3] *In re* Syracuse, etc., R. Co., 91 N. Y. 1; Ffooks *v.* Southwestern Ry., 1 Sm. & G. 142; Foster *v.* Seymour, 23 Fed. R. 65.

[4] Scovill *v.* Thayer, 105 U. S. 143; Harrison *v.* Union Pac. R. Co., 13 Fed. R. 522; St. Louis, etc., R. R. Co. *v.* Tiernan, 37 Kan. 606, s. c. 15 Pac. R. 544, where the giving of $3,600,000 of stock and payment of $200,000 to directors of the company for an old road-bed which cost them $15,000, when all the stockholders and directors knew all the facts, was held to give the corporation no cause to complain, s. c. 40 Am. & Eng. R. Cas. 525, 544. See, also, Arkansas, etc., Co. *v.* Farmers', etc., Co., 13 Colo. 587, 22 Pac. R. 954; First Nat. Bank *v.* Gustin, etc., Co., 42 Minn. 327, 44 N. W. R. 198.

[5] Sagory *v.* Dubois, 3 Sandf. Ch. (N. Y.) 466, 499; Upton *v.* Tribilock, 91 U. S. 45; Scovill *v.* Thayer, 105 U. S. 143; Bates *v.* Great Western Tel. Co., 134 Ill. 536, 25 N. E. R. 521; Hickling *v.* Wilson, 104 Ill. 54; Great Western Tel. Co. *v.* Gray, 122 Ill. 630, 14 N. E. R. 214; Mann *v.* Cooke, 20 Conn. 178; Skrainka *v.* Allen, 76 Mo. 384; Fisher *v.* Seligman, 7 Mo. App. 383; Flinn *v.* Bagley, 7 Fed. R. 785; Stutz *v.* Handley, 41 Fed. R. 531; Camden *v.* Stuart, 144 U. S. 104. But in Clark *v.* Bever, 139 U. S. 96, it was held that a railroad company in financial straits could settle with a creditor by giving him stock at twenty cents on the dollar, and that other corporate creditors could not afterwards hold him liable for the additional eighty cents.

[6] Scovill *v.* Thayer, 105 U. S. 143, 155. Where a director takes shares of the capital stock as a bonus for his influence he becomes subject to the liabilities of a shareholder who has taken stock but has not paid for the same, and a contract between him and the company that the stock shall not be assessable can not relieve him of the liability. Richardson *v.* Green, 133 U. S. 30, 10 Sup. Ct. R. 280; McAvity *v.* Lincoln, etc., Co., 82 Me. 504; Allen *v.* Fairbanks, 45 Fed. R. 445; Haldeman *v.* Ainslie, 82 Ky. 395. But see Christensen *v.* Quintard, 29 N. Y.

the United States, in a recent, yet much criticised case, that "an active corporation may, for the purpose of paying its debts and obtaining money for the successful prosecution of its business, issue its stock and dispose of it for the best price that can be obtained," and that it may give the purchaser paid-up stock as a bonus without making him liable on such stock.[1]

§ 91. **Stock paid for by overvalued property—Sale of stock on market.**—Where the stock is paid for in property at a fraudulent overvaluation, the corporate creditor may compel a rescission of the sale *in toto*,[2] and the restoration of the stock or its actual value,[3] unless he knew of the manner in which payment was made for the stock before he became a creditor.[4] It has also been stated broadly that the creditor must affirm *in toto* or rescind *in toto* and that he can not hold the owner of such stock liable as for an unpaid subscription.[5] But most of the cases relied upon in support of this doctrine are cases in which the stock was not issued upon an ordinary subscription,

S. R. 61, where it is held that a reduction of forty per cent. in the price of stock and bonds was a donation by the corporation to induce him to take the stock, and a judgment creditor can not claim it in payment of his debt. See, also, Christensen *v.* Eno, 106 N. Y. 97.

[1] Handley *v.* Stutz, 139 U. S. 417. See, also, Hospes *v.* Northwestern, etc., Co., 48 Minn. 174, 50 N. W. R. 1117; Coe *v.* East & W. R. R. Co., 52 Fed. R. 531. See criticism in 2 Thomp. Corp., § 2092.

[2] Currie's Case, 3 De G., J. & S. 367; Van Cott *v.* Van Brunt, 82 N. Y. 535; Phelan *v.* Hazard, 5 Dill. (U. S.) 45; Coffin *v.* Ransdell, 110 Ind. 417.

[3] In Iowa (Osgood *v.* King, 42 Iowa 478) and in Missouri (Shickle *v.* Watts, 94 Mo. 410) it is held that the court will decree the payment of the difference between the value of the property or labor given in exchange for stock and its par value, even where no fraud is proven, but this is against the weight of authority. See, also, Libby *v.* Tobey, 82 Me. 397, s. c. 19 Atl. R. 904.

[4] Bank of Fort Madison *v.* Alden, 129 U. S. 372, s. c. 9 Sup. Ct. R. 332.

[5] 1 Cook on Stock and Stockholders, § 46; 1 Beach on Private Corporations, § 120; Coffin *v.* Ransdell, 110 Ind. 417. In Fogg *v.* Blair, 139 U. S. 118, s. c. 11 Sup. Ct. R. 476, the stock was not shown to be of any value and the court said that the creditors were not, therefore, wronged. In Anderson's Case, L. R. 7 Ch. Div. 75, the court said that the contract was for paid-up stock and to hold the owner liable as a "contributory" would be to make a new contract.

but in payment for the construction of the road, or the like,[1] and, whatever may be the rule in such cases, it seems unjust and in violation of true principle, to extend it to ordinary subscriptions.[2] It is a questionable doctrine at the best, and, upon principle, a subscriber who fraudulently pays his subscription in grossly overvalued property, or property which is practically worthless or of so little value that the transaction should be presumed to be fraudulent, and receives paid-up stock therefor, ought not to be allowed to take advantage of his own fraud and thus occupy a better position than one who has paid cash and acted in good faith, but should, on the contrary, be held liable to creditors whom he has misled for the entire subscription, where the property is worthless, and, it would seem, for the difference between the value of the property and the par value of the stock, in other cases, if the corporation is insolvent.[3] But, in the absence of fraud, paid-up stock may be paid for in property such as the corporation may use, and it will make no difference that the property afterwards turns out to be of less value than was supposed.[4] The court, in such a case,

[1] Fogg *v.* Blair, 139 U. S. 118, s. c. 11 Sup. Ct. R. 476; Van Cott *v.* Van Brunt, 82 N. Y. 535; Barr *v.* New York, etc., R. R. Co., 125 N. Y. 263.

[2] See Lloyd *v.* Preston, 146 U. S. 630, s. c. 13 Sup. Ct. R. 131; Camden *v.* Stuart, 144 U. S. 104; Elyton, etc., Co. *v.* Birmingham, etc., Co., 92 Ala. 407, 9 So. R. 129; Garrett *v.* Kansas, etc., Co., 113 Mo. 330, 20 S. W. R. 965; Gogebic, etc., Co. *v.* Iron Chief, etc., Co., 78 Wis. 427, s. c. 47 N.W. R. 726. These cases would also seem to deny the universal application of the alleged rule stated in Coffin *v.* Ransdell, 110 Ind. 417; Scovill *v.* Thayer, 105 U. S. 143, and other cases cited in a previous note, that the transaction must first be set aside as fraudulent in a proceeding for that purpose before the subscriber can be held liable in any event, and we see no reason for such rule in the code states where the same court has both law and equity jurisdiction and can give full relief in one proceeding.

[3] Camden *v.* Stuart, 144 U. S. 104; Clayton *v.* Ore., etc., Co., 109 N. C. 385, 14 S. E. R. 36; Boulton, etc., Co. *v.* Mills, 78 Iowa 460, s. c. 43 N. W. R. 290, 5 L. R. A. 649; Chisholm *v.* Forny, 65 Iowa 333; Jackson *v.* Traer, 64 Iowa 469; Osgood *v.* King, 42 Iowa 478; First Nat. Bank *v.* Gustin, etc., Co., 42 Minn. 327, 44 N. W. R. 198; Peninsular, etc., Bank *v.* Black, etc., Co., (Mich.) 63 N. W. R. 514. See, also, Bates *v.* Great Western Tel. Co., 134 Ill. 536, s. c. 25 N. E. R. 521; McAvity *v.* Lincoln Pulp, etc., Co., 82 Me. 504, s. c. 20 Atl. R. 82; Douglass *v.* Ireland, 73 N. Y. 100; Gamble *v.* Queens, etc., Co., 123 N. Y. 91, s. c. 25 N. E. R. 201, 9 L. R. A. 527.

[4] Coit *v.* North Carolina Gold, etc., Co., 14 Fed. R. 12, affirmed in 119 U.

"will treat that as payment which the parties have agreed should be payment."[1] And it has been held that the fact that one to whom such stock is issued returns a portion of it as a gift to the corporation to sell below par and place the proceeds in the corporate treasury does not necessarily prove that the property was overvalued.[2] A corporation may also distribute to its shareholders, or sell on the market, shares of stock which it has purchased under legislative authority,[3] or which have been forfeited to it for non-payment of calls.[4]

§ 92. **Sale and transfer of stock.**—Shares of stock (unless declared by statute to be real estate) are personal property,[5] and are subject to purchase and sale by natural persons as other personal property, and the right of the shareholder to sell and transfer his stock can not be restrained by a by-law of the corporation.[6] But reasonable regulations may be made

S. 343; Bickley *v.* Schlag, (N. J.) 20 Atl. R. 250; Clow *v.* Brown, 134 Ind. 287, 31 N. E. R. 361; Commonwealth *v.* Central Pass. Ry., 52 Pa. St. 506; Drummond's Case, L. R. 4 Ch. Ap. 772; Young *v.* Erie, etc., Co., 65 Mich. 111, s. c. 31 N. W. R. 814; Whitehill *v.* Jacobs, 75 Wis. 474, s. c. 44 N. W. R. 630; Schenck *v.* Andrews, 57 N. Y. 133.

[1] Phelan *v.* Hazard, 5 Dill. (U. S.) 45, s. c. 6 Cent. L. J. 109; Brant *v.* Ehlen, 59 Md. 1; Coffin *v.* Ransdell, 110 Ind. 417; Peck *v.* Coalfield Coal Co., 11 Ill. App. 88.

[2] Lake Superior Iron Co. *v.* Drexel, 90 N. Y. 87; Williams *v.* Taylor, 120 N. Y. 244. See, also, Davis *v.* Montgomery, etc., Co., 101 Ala. 127, 8 So. R. 496. But compare Alling *v.* Wenzel, 133 Ill. 264; Alling *v.* Ward, 30 Am. & Eng. Corp. Cas. 133.

[3] Commonwealth *v.* Boston, etc., R. Co., 142 Mass. 146.

[4] Ramwell's Case, 50 L. J. (Ch.) 827; Otter *v.* Brevoort, etc., Co., 50 Barb. (N. Y.) 247; People *v.* Albany, etc., R. R. Co., 55 Barb. (N. Y.) 344, 371.

[5] *Ante*, § 79; note to *In re* Klaus, 26 Am. L. Reg. (N. S.) 98, 104. And as such they are generally held in America to be included in the phrase "goods, wares and merchandise" in the statute of frauds. Baltzen *v.* Nicolay, 53 N. Y. 467; Tisdale *v.* Harris, 20 Pick. (Mass.) 9; North *v.* Forest, 15 Conn. 400; Mason *v.* Decker, 72 N. Y. 595, s. c. 28 Am. R. 190; Boardman *v.* Cutter, 128 Mass. 388; Hinchman *v.* Lincoln, 124 U. S. 38; Pray *v.* Mitchell, 60 Me. 430. But see Vawter *v.* Griffin, 40 Ind. 593, 602; Green *v.* Brookins, 23 Mich. 48, s. c. 9 Am. R. 74; Gadsden *v.* Lance, 1 McMull. Eq. (S. Car.) 87, s. c. 37 Am. Dec. 548. Statute does not apply to agreement to take back or repurchase. Fitzpatrick *v.* Woodruff, 96 N. Y. 561; Meyer *v.* Blair, 109 N. Y. 600, s. c. 4 Am. St. R. 500; Thorndike *v.* Locke, 98 Mass. 340; Richter *v.* Frank, 41 Fed. R. 859; Fay *v.* Wheeler, 44 Vt. 292.

[6] Morgan *v.* Struthers, 131 U. S. 246, 252, s. c. 9 Sup. Ct. R. 726; *In re* Klaus, 67 Wis. 401, 29 N. W. R. 582; Gould *v.* Head, 41 Fed. R. 240, 247; Feck-

regarding the formalities of transfer and registration,[1] and such matters are frequently provided for in the charter or by statute.[2] The transfer, in order to relieve the transferer from further liability, must usually be absolute,[3] and to a person capable of succeeding to his liabilities.[4] Where the shares are not fully paid-up a transfer to an insolvent person, or "man of straw," for the purpose of avoiding liability, can not be made so as to relieve the transferer from liability to creditors upon his stock.[5] But, as a general rule, a regular transfer of shares of corporate stock will not be disturbed by the courts unless it is satisfactorily shown that it was conditional, designed to serve as collateral or pledge to secure a payment, or was simulated and not intended to transfer the ownership.[6]

heimer *v.* Nat. Exch. Bank, 79 Va. 80; Moore *v.* Bank, 52 Mo. 377; Sargent *v.* Franklin Ins. Co., 8 Pick. (Mass.) 90, s. c. 19 Am. Dec. 306. Such a by-law would be in restraint of trade and contrary to public policy. But an agreement between members not to sell except on certain conditions may be valid if not in unreasonable restraint of trade. 1 Cook on Stock and Stockholders, § 332. See, also, Dane *v.* Young, 61 Me. 160; Metropolitan, etc., Bank *v.* St. Louis, etc., Co., 36 Fed. R. 722; New England Trust Co. *v.* Abbott, 162 Mass. 148, s. c. 27 L. R. A. 271, and note. The right to sell and transfer stock of a railroad company can not be exercised to the prejudice of the public in a manner prohibited by law, and illegal agreements for "corners" in stock and the like will not be enforced. Pennsylvania R. R. Co. *v.* Commonwealth, (Pa.), 7 Atl. R. 368; Town Council *v.* Elliott, 5 Ohio St. 113; Sampson *v.* Shaw, 101 Mass. 145; Leonard *v.* Poole, 114 N. Y. 371. But see Havemeyer *v.* Havemeyer, 11 J. & S. (N. Y.) 506, s. c. 13 J. & S. 464, 86 N. Y. 618. As to such contracts and wager or gambling contracts generally, see 1 Cook on Stock and Stockholders, §§ 333, 341–348.

[1] Dane *v.* Young, 61 Me. 160; Planters', etc. Co., *v.* Selma Sav. Bank, 63 Ala. 585; Bishop *v.* Globe, etc., Co., 135 Mass. 132, s. c. 5 Am. & Eng. Corp. Cas. 161.

[2] Shepherd's Case, L. R. 2 Eq. 564; Smith *v.* Canada Car Co., 6 Upper Can. Pr. R. 107; Fractor's, etc., Co. *v.* Marine, etc., Co., 31 La. Ann. 149; Merrill *v.* Call, 15 Me. 428.

[3] National Bank *v.* Case, 99 U. S. 628; Billings *v.* Robinson, 94 N. Y. 415; Veiller *v.* Brown, 18 Hun (N.Y.) 571.

[4] 1 Beach Priv. Corp., § 128; Taylor's Priv. Corp., § 747; Article in 8 Cent. L. J. 182.

[5] Dauchy *v.* Brown, 24 Vt. 197; Marcy *v.* Clark, 17 Mass. 330; Bowden *v.* Johnson, 107 U. S. 251; Rider *v.* Morrison, 54 Md. 429; Gaff *v.* Flesher, 33 Ohio St. 107; Aultman's Appeal, 98 Pa. St. 505; McClaren *v.* Franciscus, 43 Mo. 452; 1 Beach Priv. Corp., § 127, and numerous authorities there cited.

[6] Small *v.* Saloy, 42 La. Ann. 183, 7 So. R. 450. See, also, Farmers' L. & T. Co. *v.* Chicago, etc., R. Co., 163 U. S. 31, 16 Sup. Ct. R. 917.

Stock can generally be completely transferred only on the books of the corporation, and the company is entitled to require proof of the right of the holder of certificates to demand such a transfer.[1] If it permits stock to be transferred to one having no right to the same, it will be liable to the rightful owner.[2]

[1] Buttrick *v.* Nashua, etc., R. Co., 62 N. H. 413; Telegraph Co. *v.* Davenport, 97 U. S. 369; Davis *v.* Bank of England, 2 Bing. 393; Bayard *v.* Farmers', etc., Bank, 52 Pa. St. 232. Transfers of stock in corporations organized under Ky. Gen. Stat., chap. 56, are valid against creditors as well as between the parties, although not recorded in the books of the company. Thurber *v.* Crump, 86 Ky. 408. One acting as the agent of a trust company, to enable it to perpetrate a fraud or wrong on the rights of a stockholder, and who has thus acquired possession of certificates of stock, can not compel a transfer of the stock to him on the books of the corporation. Gould *v.* Head, (C. C. D. Colo.) 7 R. R. & Corp. L. J. 402, 41 Fed. R. 240. If the corporation refuses to make the transfer, upon proper request, the party entitled to have it made has his remedy, although there is considerable conflict among the authorities as to whether it is by mandamus, by suit in equity, or by an action at law for damages. See 1 Cook on Stock and Stockholders, §§ 389–392; Green Mount, etc., Co. *v.* Bulla, 45 Ind. 1; State *v.* Cheraw, etc., R. R. Co., 16 S. Car. 524; Cushman *v.* Thayer, etc., Co., 76 N. Y. 365; Iron R. R. Co. *v.* Fink, 41 Ohio St. 321; Hoppin *v.* Buffum, 9 R. I. 513, s. c. 11 Am. R. 291; *Re* St. Lawrence, etc., Co., 44 N. J. L. 529; Doty *v.* First Nat. Bank, 3 N. Dak. 9, 53 N. W. R. 77; Rio Grande, etc., Co. *v.* Burns, 82 Tex. 50, 17 S. W. R. 1043.

[2] Pratt *v.* Boston, etc., R. Co., 126 Mass. 443; Midland R. Co. *v.* Taylor, 8 H. L. Cases 751, affirming Taylor *v.* Midland R. Co., 29 L. J. Ch. 731, *ante*, § 80. Where an executor surrenders stock to a reorganization committee of a corporation, taking therefor negotiable certificates redeemable after a reorganizattion by a new issue of stock, and after his removal from the executorship, transfers the certificates, which, after several transfers, are taken up by the corporation and new stock issued to the holders in lieu thereof, the corporation is liable to the legatees for the value of the stock at the time of the transfer on the books of the company. Mobile & O. R. Co. *v.* Humphries. (Miss.), 7 So. R. 522. If a corporation negligently cancels a person's stock and issues certificates therefor to a third party, the true owner may bring action against the corporation to compel replacement of his stock or its value. St. Romes *v.* Levee Steam Cotton-Press Co., 127 U. S. 614, 32 L. Ed. 289. An agent, with power of attorney authorizing him to sell and transfer stock and other securities and property, caused stock belonging to the principal to be transferred to himself on the books of the company, without the knowledge of the principal. The court held that the corporation was liable to the original stockholder. Tafft *v.* Presidio & F. R. Co., 84 Cal. 131; Revering 22 Pac. 485, where it was held that the power was sufficient to authorize a transfer to the the agent, and the fact that such agent was a director of the corporation would not

"The act of a corporation in transferring shares of stock without the authority of the owner is not ratified by the latter's having told another agent than the one on whose application the transfer was made that he would not hold him responsible for delivering the certificates to the agent who applied for the transfer."[1]

§ 93. **Who may own and transfer shares.**—Married women are generally enabled to become the owners of shares of stock, by the statutes of the various states,[2] and also to a limited degree in England.[3] Purchases and sales of stock by an infant are voidable at any time during infancy,[4] or within a reasonable time after becoming of age,[5] as are his other contracts. The corporation, it has been held, is bound to know of the inability of a person who is *non compos mentis* to make a valid transfer, and may become liable if it permits a registry.[6] A sale of stock by a drunken person will be set aside, unless fairly made and for a sufficient consideration.[7] An unrecorded transfer, made in good faith before assignment by an insolvent, will be protected.[8] But if the transferee delay unreasonably

charge it with notice. A corporation may also be liable to the transferee where it represents that a forged certificate is genuine. Mut. Life Ins. Co. *v.* Forty-second St., etc., Co., 74 Hun 505, explaining Fifth Ave. Bank *v.* Forty-second St., etc., Co., 137 N. Y. 231.

[1] Quay *v.* Presidio & F. R. Co., 82 Cal. 1, 22 Pac. 925.

[2] Witters *v.* Sowles, 38 Fed. R. 700, construing law of Vermont. A married woman has the legal capacity to receive a transfer of stock in moneyed corporations though the consideration may have been paid entirely by the husband. Keyser *v.* Hitz, 133 U. S. 138, 33 L. Ed. 531. The wife's capacity to hold and transfer stock is generally determined by the law of her domicile, but that of the domicile of the corporation should also be consulted. Hill *v.* Pine River Bank, 45 N. H. 300; Cook on Stock and Stockholders, § 319.

[3] Cook on Stock and Stockholders, § 319.

[4] Birkenhead, etc., R. Co. *v.* Pilcher, 5 Ex. 24. Voidable and not void. Smith *v.* Nashville, etc., R. Co., (Tenn.), 18 S. W. R. 546; Lumsden's Case, L. R., 4 Ch. App. C. 31.

[5] Dublin, etc., R. Co *v.* Black, 8 Ex. 181. But if he does not so disaffirm within a reasonable time (in this case ten months) he will be bound. Ebbett's Case, L. R. 5 Chan. App. C. 302. Even a sale by transfer of the certificate is not binding on an infant. Smith *v.* Baker, 42 Hun 504.

[6] Chew *v.* Bank of Baltimore, 14 Md. 299.

[7] Thackrah *v.* Haas, 119 U. S. 499.

[8] Dickinson *v.* Central Nat. Bank, 129 Mass. 279, s. c. 37 Am. R. 351.

to claim his stock, it may be awarded to the assignee.[1] An officer or director of the company may buy and sell its stock like any other person, if he acts in good faith and does not mislead the person with whom he deals,[2] and he is not bound to disclose information received by him as such officer.[3] A partner may also sell and transfer partnership stock,[4] but a joint owner can not transfer the interest of the other joint owner of stock registered in the name of both.[5] Stock may be bought or sold by means of an agent,[6] and the principal will be bound by the acts of the agent done in excess of his authority, if the agent was clothed with apparent authority and the limitations imposed were unknown to the person dealing with him in good faith.[7]

§ 94. **Purchase and sale by trustees and fiduciaries.**—The common law rule is that guardians, executors and trustees may not use trust funds for the purchase of shares of stock,[8] nor sell shares which form a part of the trust estate,[9] except as em-

[1] Shipman *v.* Ætna Ins. Co., 29 Conn. 245.

[2] Trisconi *v.* Winship, 43 La. Ann. 45, s. c. 33 Am. Eng. Corp. Cas. 271; *In re* Cawley, L. R., 42 Ch. Div. 209; Board *v.* Reynolds, 44 Ind. 509; Carpenter *v.* Danforth, 52 Barb. (N. Y.) 581; Crowell *v.* Jackson, 53 N. J. 656, 23 Atl. R. 426. But see Grant *v.* Attrill, 11 Fed. R. 469; Gilbert's Case, L. R. 5 Ch. App. C. 559; *In re* South London, etc., Co., L. R. 39 Ch. Div. 324, s. c. 60 L. T. R. N. S. 68; Fisher *v.* Budlong, 10 R. I. 525; Prewett *v.* Trimble, 92 Ky. 176, 17 S. W. R. 356.

[3] Board, etc., *v.* Reynolds, 44 Ind. 509.

[4] Quiner *v.* Marblehead Social Ins. Co., 10 Mass. 476.

[5] Comstock *v.* Buchanan, 57 Barb. (N. Y.) 127; Standing *v.* Bowring, L. R., 27 Ch. Div. 341. In most of the states, a joint-tenancy can only be created by an express statement or a manifest intention to create an estate limited to the survivor. Stinson's Am. Stat. Law, § 1371.

[6] 1 Cook on Stock and Stockholders, Ch. 25. An agent has no further real interest in stock standing in his name than he has in any other property of his principal in his hands. Cook on Stock and Stockholders, Ch. 25, § 321.

[7] McNeil *v.* Tenth National Bank, 46 N. Y. 325; Strange *v.* Houston, etc., R. Co., 53 Tex. 162, where the owner of a certificate of stock in an incorporated company, placed his certificate, with a blank transfer indorsed thereon, in the hands of an agent for sale; the agent filled the blank with his own name, and afterward indorsed thereon a transfer from himself to a *bona fide* purchaser, and it was held that such purchaser took a good title to the stock.

[8] Trafford *v.* Boehm, 3 Atk. 440 (1746).

[9] Bohlen's Estate, 75 Penn. St. 304.

powered to do so by the statute,[1] or by the instrument creating the trust, or directed to do so by a court of chancery.[2] It is held under the English Companies Act of 1845, paragraph 18, that when the names of the executors of a deceased shareholder in a company are placed on the register of shareholders in respect of shares, which belonged to their testator, they become joint-shareholders in their individual capacity, although they may be described as executors in the register; and, consequently, the shares can only be transferred by means of a transfer executed by all of them.[3] If a sale of shares held in trust be made by the trustee without authority he may be compelled to restore the stock with dividends, or to pay over the amount received therefor with interest, at the election of the *cestui que trust*.[4] And the same rule is enforced where the stock is sold in breach of the trust and converted to the use of the trustee, even though he was empowered to sell.[5] A *bona fide* purchaser from a trustee without notice takes a good title to the stock transferred.[6] But anything which is sufficient to put the purchaser upon inquiry that would, if reasonably pursued, disclose the real facts, will amount to constructive notice.[7]

[1] See 22 and 23 Victoria, Ch. 35, Sec. 32, 23 and 24 Victoria, Ch. 38.

[2] This is the rule of law in many of the states at the present time. King *v.* Talbot, 40 N. Y. 76; Ihmsen's Appeal, 43 Pa. St. 431; Ward *v.* Kitchen, 30 N. J. Eq. 31; Kimball *v.* Reding, 31 N. H. 352; Allen *v.* Gaillard, 1 S. C. (Rich. N. S.) 279; Tucker *v.* State, *ex rel.* Hart, 72 Ind. 242. This rule stated in the text obtains generally in the United States and England. Hill on Trustees, Marginal page 369; Perry on Trusts 407, Sec. 552, 553. Some of the states have upheld the rule that trustees may invest the trust funds in stocks without special authority. Washington *v.* Emery, 4 Jones Eq. (N. Car.) 32; Gray *v.* Lynch, 8 Gill (Md.) 403; Smyth *v.* Burns, 25 Miss. 422; Lamar *v.* Micou, 112 U. S. 452, and 114 U. S. 218 (Ga. and Ala.). See, also, Boggs *v.* Adger, 4 Rich. Eq. (S. C.) 408, and dictum in Hunt, Appellant, 141 Mass. 515.

[3] Barton *v.* London & N. W. R. Co., L. R. 24 Q. B. D. 77.

[4] Harrison *v.* Harrison, 2 Atk. 121; Hart *v.* Ten Eyck, 2 Johns. Ch. 62, 117; Pinkett *v.* Wright, 2 Hare 120; McKim *v.* Hibbard, Exr., 142 Mass. 422.

[5] McKim *v.* Hibbard, Exr., 142 Mass. 422.

[6] Smith *v.* Nashville, etc., R. Co., 91 Tenn. 221; Salisbury Mills *v.* Townsend, 109 Mass. 115; Cook on Stock and Stockholders, § 325. The rule is otherwise in England until the purchaser has obtained registry. Shropshire Union R., etc., Co. *v.* Queen, L. R. 7 H. L. 496; Roots *v.* Williamson, 58 L. T. Rep. 802.

[7] Where the stockholder is termed

If the trustee has authority to transfer the stock for any purpose, the purchaser may assume that the proceeds of the sale will be properly disposed of,[1] and he will be protected unless he knows that the sale or pledge is to procure means for the private debts or purposes of the trustee.[2] The corporation is liable to the *cestui que trust*, if, with notice that stock is held in trust, it permits such stock to be transferred on the books of the company by the trustee without authority.[3] The word "trustee" following the holder's name is sufficient notice;[4] and

in the certificate a "trustee" or stated therein to hold the shares "in trust," this is notice of everything, which, upon inquiry, the purchaser could ascertain from the *cestui que trust*. Shaw *v.* Spencer, 100 Mass. 382; Jaudon *v.* National City Bank, 8 Blatch. (U. S.) 430; Duncan *v.* Jaudon, 15 Wall. (U. S.) 165, 176; Gerard *v.* McCormick, 130 N. Y. 261.

[1] Perry on Trusts (3d. Ed.), § 225; Ashton *v.* Atlantic Bank, 3 Allen (85 Mass.) 217.

[2] Simons *v.* Southwestern R. Bank, 5 Rich. Eq. (S. C.) 270; Jaudon *v.* National City Bank, 8 Blatch. (U.S.) 450; s. c. Duncan *v.* Jaudon, 15 Wall. (U. S.) 165.

[3] Maywood *v.* Railroad Bank, 5 S. Car. 379; Chapman *v.* City Council, 30 S. Car. 549, 6 S. E. Rep. 158; Bohlen's Estate, 75 Pa. St. 304; Barton *v.* North, etc., R. Co., L. R. 38 Ch. D. 458, 58 L. T. Rep. 549. See Bird *v.* Chicago, etc., R. Co., 137 Mass. 428, Weyer *v.* Second Nat. Bank, 57 Ind. 198; Marbury *v.* Ehlen, 72 Md. 206, 19 Atl. 648. A corporation having issued stock certificates showing on their face that they were to be taken by the holder as devisee under and subject to the provisions of a certain will, is chargeable with notice of the contents of such will and of the trusts imposed thereby, in all subsequent dealings with such shares of stock, and is liable for a conversion by a trustee to the prejudice of the rights of the *cestui que trust*, of which it has notice, where it aids such conversion by transfer of the stock and reissuance of certificates. Caulkins *v.* Gaslight Co., 85 Tenn. 683, 4 Am. St. Rep. 786. Generally the corporation is not chargeable with liability for transferring stock in violation of trusts, of which it had no actual notice. Peck *v.* Providence Gas Co., 17 R. I. 275. Where the administrator of an estate transferred certain shares of stock to the "heirs and distributees" of his decedent's estate, it was held that the corporation was not bound to hold the stock subject to a trust imposed by the will of the decedent, of which it had no actual knowledge, but was justified in transferring her proportion of the stock to the grantee of the decedent's daughter. Smith *v.* Nashville, etc., R. Co., 91 Tenn. 221.

[4] Loring *v.* Salisbury Mills, 125 Mass. 138. The fact that the transfer is made some years after the execution of the trust should have been completed, is notice. Lowry *v.* Commercial, etc., Bank, etc., Taney's Dec. (U. S.) 310.

formal notice to a board of directors is notice to the corporation under all future boards.[1]

§ 95. **Right of corporation to buy and sell stock.**—In England it is held that a corporation can not buy shares of its own stock,[2] unless expressly empowered to do so. In case of a transfer of stock to the corporation[3] or to a trustee in trust for it, where this rule prevails, the transferer is liable on the subscription, and on the statutory liability in case of insolvency to the same extent as if he still held the stock,[4] unless the corporation has authority by charter or otherwise to make the purchase.[5] Where, however, he does not know that the trustee takes the stock in trust for the corporation, but believes him to be a *bona fide* purchaser, the seller is not so liable.[6] The trustee accepting such a conveyance[7] and the directors procuring it[8] are also personally liable to the corporation and its creditors on all shares so conveyed. A person who has been employed by a railroad company to buy the stock of a certain person for the purpose of consummating a sale of the corporate property, who buys such stock in his own name, must be regarded as holding it subject to the equitable considerations growing out of an arrangement previously made by his vendor with parties acting in the interest of the corporation, and the most that he can have after a transfer of the corporate property is the fair value of the stock at the time of

[1] Mechanic's Bank, etc., *v.* Seton, 1 Pet. (U. S.) 299.

[2] Trevor *v.* Whitworth, L. R. 12 App. C. 409, 57 L. T. R. 457; Zulueta's Claim, L. R. 5 Ch. 444. See, also, Coppin *v.* Greenlees, etc., Co., 38 Ohio St. 275; German Sav. Bank *v.* Wulfekuhler, 19 Kan. 60; Barton *v.* Port Jackson, etc., Co., 17 Barb. (N. Y.) 397.

[3] Dillon, J., in Johnson *v.* Laflin, 5 Dill. (U. S.) 65; Great Eastern R. Co. *v.* Turner, L. R. 8 Ch. App. 149.

[4] Walters' Second Case, 3 De G. & Sm. 244; Munt's Case, 22 Beav. 55; Daniell's Case, 22 Beav. 43.

[5] Grady's Case, 1 De G., J. & S. 488.

[6] Johnson *v.* Laflin, 103 U. S. 800; Nicol's Case, 3 De G. & J. 387.

[7] Crandall *v.* Lincoln, 52 Conn. 73; Allibone *v.* Hager, 46 Pa. St. 48; Matter of Empire City Bank, 18 N. Y. 199, 226. One who has exercised ownership of stock by accepting a dividend can not deny his liability as owner. Sanger *v.* Upton, 91 U. S. 56, 60.

[8] Evans *v.* Coventry, 25 L. J. (Ch.) 489, 501. So the corporate agent may be made personally liable for moneys expended by him for such stock. Crandall *v.* Lincoln, 52 Conn. 73.

such transfer.[1] But the better American authority[2] is to the effect that a railroad company may, for legitimate purposes, purchase shares of its own stock which have been issued to individuals,[3] unless prohibited by statute.[4] And the courts of all the states hold that a corporation may take shares of its own stock in payment of, or as security for, antecedent debts due to it from the stockholder.[5] But it has been held that such purchase is voidable at the instance of corporate creditors who are injured thereby.[6] Where shares of its own stock are transferred to the corporation[7] or to a trustee for its benefit, the stock is not thereby merged, unless such is the intention, but may, it has been held, be resold by authority of the board of directors,[8] or of the stockholders, at the market price,[9] without regard to its

[1] Young *v.* Toledo & S. H. R Co., 76 Mich. 485, 40 Am. & Eng. R. Cas. 514.

[2] Clapp *v.* Peterson, 104 Ill. 26; Dupee *v.* Boston Water-power Co., 114 Mass. 37; City Bank *v.* Bruce, 17 N. Y. 507; Eby *v.* Guest, 94 Pa. St. 160; First Nat. Bank *v.* Salem, etc., Co., 39 Fed. R. 89; Hartridge *v.* Rockwell, R. M. Charlton (Ga.) 260; Farmers', etc., Bank *v.* Champlain Trans. Co., 18 Vt. 131, 139; Iowa Lumber Co. *v.* Foster, 49 Iowa 25; Snyder *v.* Tunitas, etc., Co., 72 Cal. 194; Blalock *v.* Kernersville, etc., Co., 110 N. Car. 99, s. c. 36 Am. & Eng. Corp. Cas. 84, 90, and note, where the authorities on both sides of the question are collected.

[3] Chicago, etc., R. Co. *v.* President, etc., Town of Marseilles, 84 Ill. 145.

[4] For such prohibition see Stimson Am. Stat. (1892), §§ 8216, 8217.

[5] Cook on Stock and Stockholders, § 311. A promise of a stockholder to surrender to the corporation stock on which there is an unpaid assessment, which stock is not at the time under his control, having been pledged by him, does not constitute a surrender of such stock, as against a subsequent purchaser from such stockholder. Hill *v.* Atoka, etc., Co., (Mo. Sup.) 21 S.W. R. 508, 25 S. W. R. 926.

[6] Clapp *v.* Peterson, 104 Ill. 26. See, also, Crandall *v.* Lincoln, 52 Conn. 73, s. c. 52 Am. R. 560; Heggie *v.* People's, etc., Ass'n, 107 N. C. 581, s. c. 32 Am. Eng. Corp. Cas. 605; Fraser *v.* Ritchie, 8 Ill. App. 554. So, if the corporation is insolvent at the time. Currier *v.* Lebanon, etc., Co., 56 N. H. 262; Alexander *v.* Relfe, 74 Mo. 495; *In re* Columbian Bank, 147 Pa. St. 422, 23 Atl. R. 626.

[7] State Bank of Ohio *v.* Fox, 3 Blatch. (U. S.) 431; State *v.* Smith, 48 Vt. 266; Vail *v.* Hamilton, 85 N. Y. 453; Am. R. Frog Co. *v.* Haven, 101 Mass. 398.

[8] State *v.* Smith, 48 Vt. 266; State Bank of Ohio *v.* Fox, 3 Blatch. (U. S.) 431; Williams *v.* Savage Mfg. Co., 3 Md. Ch. 418; Jefferson *v.* Burford, (Ky.) 17 S. W. R. 855. See, also, Vail *v.* Hamilton, 85 N. Y. 453; Commonwealth *v.* Boston, etc., R. R. Co., 142 Mass. 146; City Bank *v.* Bruce, 17 N. Y. 507.

[9] Ramwell's Case, 50 L. J. (Ch.) 827; Otter *v.* Brevoort, etc., Co., 50 Barb. (N. Y.) 247.

par value. But such stock, until resold, is said to be lifeless and can not be voted, nor can it draw dividends.[1] A railroad company may not purchase stock of another railroad corporation,[2] without legislative authority contained in the charter or in the general statute of the state.[3] One corporation has, generally,

[1] Monsseaux *v.* Urquhart, 19 La. Ann. 482; Brewster *v.* Hartley, 37 Cal. 15; State *v.* Smith, 48 Vt. 266; Vail *v.* Hamilton, 85 N. Y. 453; New England, etc., Ins. Co. *v.* Phillips, 141 Mass. 535; American, etc., Co. *v.* Haven, 101 Mass. 398; McNeely *v.* Woodruff, 13 N. J. Law 352.

[2] Such a purchase may be enjoined. Central R. Co. *v.* Collins, 40 Ga. 582; Hazlehurst *v.* Savannah, etc., R. Co., 43 Ga. 13, 57; Elkins *v.* Camden, etc., R. Co., 36 N. J. Eq. 5; Great North. R. Co. *v.* Eastern Counties R. Co., 21 L. J. (Ch.) 837; Pearson *v.* Concord, etc., R. Co., 62 N. H. 537; Memphis, etc., R. Co. *v.* Wood, 88 Ala. 630, s. c. 7 So. R. 108, 1 Lewis's Am. R. R. & Corp. R. 55, and note; Mackintosh *v.* Flint, etc., R. Co., (C. C. Mich.) 34 Fed. R. 582; Angell & Ames on Corp., § 392; Green's Brice's Ultra Vires, (2d Ed.) 91.

[3] Mayor *v.* Baltimore, etc., R. Co., 21 Md. 50; Zabriskie *v.* Cleveland, etc., R. Co., 23 How. (U. S.) 381 (Ohio Act); White *v.* Syracuse, etc., R. Co., 14 Barb. (N. Y.) 559; Atchison, etc., R. Co. *v.* Fletcher, 35 Kan. 236, and Atchison, etc., R. R. Co. *v.* Cochran, 43 Kan. 225, s. c. 1 Lewis's Am. R. R. & Corp. R. 640, construing Kansas statute; Matthews *v.* Murchison (C. C. N. C.) 17 Fed. R. 760. Authority to consolidate with a road gives power to purchase its stock with a view to securing that end. Hill *v.* Nisbet, 100 Ind. 341. For a construction of the provision in the constitution of Pennsylvania that a railroad company may not control a competing line, see The Commonwealth *v.* South Pa. R. Co., 1 Co. Ct. (Pa.) 214, 223. Affirmed by Sup. Ct. 29 Am. & E. R. Cas. 145, 154, where it is held to prohibit a purchase of the stock of a competing line by a railroad company in its own name or in the name of another road which it controls. To the same point under the constitution of Georgia, see Clarke *v.* Central R., etc., Co., 50 Fed. Rep. 338 (1892). A railroad company is authorized to purchase the stock of another company for the purpose of acquiring its roadbed and right of way, by a statute (How. Mich. 3403), which provides that "it shall be lawful for any railroad company in this state, which shall have entered in good faith upon the work of constructing its road, and shall become unable to complete the construction of the same, or any part thereof, to sell and convey the whole or any part of its road so partially completed, together with the rights and franchises connected therewith, to any other railroad company or corporation of this state not having the same terminal points and not being a competing line." Dewey *v.* Toledo, etc., R. Co., 91 Mich. 351, 50 Am. & Eng. R. Cas. 607. A railroad company may purchase and vote the stock of another company in like manner as an individual under the New York statute. Oelbermann *v.* New York, etc., R. Co., (N. Y. Sup. Ct.) 77 Hun 332.

no implied power to invest money in the stocks of another.[1] But a corporation may have the right to acquire shares in another company in the usual course of its legitimate business,[2] or to protect itself by way of compromise or security or payment of a doubtful debt owing to it by the corporation whose shares it receives.[3] A contract by the stockholders of a corporation to transfer their stock to a person or corporation not allowed by law to hold the same is illegal and void.[4]

§ 96. **Gifts and bequests of stock.**—Shares of stock in a corporation may be the subject of a gift.[5] A clear intent to give it must be proven, although no formal method of transfer is necessary.[6] But in England, under the statutes, the stock must be registered in the name of the donee, in order to vest the title in him.[7] Stock may also be bequeathed by will like other property.[8]

§ 97. **Formalities of transfer.**—In making a complete and formal transfer of shares of stock three separate and distinct steps are usually taken. The certificate is assigned by the transferer to the transferee, the certificate is then surrendered or delivered to the corporation, and finally the transfer is duly registered in the books of the corporation. A new certificate

[1] Cook on Stock and Stockholders, § 315; Morawetz Priv. Corp., § 431; Hamilton *v.* Savannah, etc., Ry. Co., 49 Fed. Rep. 412; People *v.* Chicago Gas Trust Co., 130 Ill. 268, 22 N. E. R. 798, s. c. 1 Lewis's Am. R. R. & Corp. R. 562; Franklin Bank *v.* Commercial Bank, 36 Ohio St. 350; Franklin Co. *v.* Lewiston Institution, 68 Me. 43; Great Northern Ry. Co. *v.* Eastern, etc., Ry. Co., 21 L. J. Ch. 837. But see Booth *v.* Robinson, 55 Md. 419; Ryan *v.* Leavenworth, etc., Ry. Co., 21 Kan. 365.

[2] Royal Bank of India's Case, L. R. 4 Ch. App. Cas. 252.

[3] First Nat. Bank *v.* Nat., etc., Bank, 92 U. S. 122, 128; Fleckner *v.* Bank, 8 Wheat. (U. S.) 351.

[4] State *v.* Ohio, etc., R. Co., 6 Ohio Cir. Ct. R. 415.

[5] Cook on Stock and Stockholders, § 308. See DeCaumont *v.* Bogert, 36 Hun (N. Y.) 382; Walker *v.* Joseph, etc., Co., 47 N. J. Eq. 342, 20 Atl. Rep. 885; Jackson *v.* Twenty-third St. Ry. Co., 88 N. Y. 520; Reed *v.* Copeland, 50 Conn. 472; Grymes *v.* Hone, 49 N. Y. 17; Roberts Appeal, 85 Pa. St. 84.

[6] Cook on Stock and Stockholders, § 308. But see Matthews *v.* Hoagland, 48 N. J. Eq. 455, 21 Atl. Rep. 1054.

[7] Nanney *v.* Morgan, 57 L. T. Rep. 48.

[8] For the effect of different forms of devise and of gifts *causa mortis*, see Cook on Stock and Stockholders, Chap. XVIII.

is then, ordinarily, issued to the transferee.[1] But where no certificate has ever been issued, the registry of the transfer upon the books of the company will be sufficient,[2] and a transfer may be good, even where a certificate has been issued, without surrendering it.[3] So, in the absence of any valid provision to the contrary, a transfer may be made, at least as between the parties, by mere delivery of the certificate without any written assignment or registration.[4] Ordinarily, however, the assignment is made in writing upon the certificate, and it is held in accordance with the well established custom, that the assignment may be made in blank, that is, it may be signed by the transferer without inserting the name of the transferee, who, upon its delivery to him, may insert his own name.[5] Such an assignment is usually accompanied by a power of attorney, also signed in blank, authorizing such attorney to sign the transfer or registry upon the books of the company, thus obviating any necessity for the presence of the transferer at the office of the company, and this blank may likewise be filled out by the transferee,[6] or by the registry clerk.[7]

[1] But this is not absolutely essential. Chouteau Spring Co. *v.* Harris, 20 Mo. 382; First Nat. Bank *v.* Gifford, 47 Iowa 575.

[2] First Nat. Bank *v.* Gifford, 47 Iowa 575; Brigham *v.* Mead, 10 Allen (Mass.) 245.

[3] Finn *v.* Brown, 142 U. S. 56; Roberts' Appeal, 85 Pa. St. 84; Citizens' St. Ry. *v.* Robbins, 128 Ind. 449, s. c. 26 N. E. Rep. 116; De Caumont *v.* Bogert, 36 Hun (N. Y.) 382; Hasting *v.* Blue Hills, etc., Co., 9 Pick(Mass.) 80; New York, etc., R. R. Co. *v.* Schuyler, 34 N. Y. 30; Seeligson *v.* Brown, 61 Tex. 114, s. c. 10 Am. & Eng. Corp. Cas. 143. But see Moores *v.* Citizens' Nat. Bank, 111 U. S. 156.

[4] Walsh *v.* Sexton, 55 Barb. (N. Y.) 251; Allerton *v.* Lang, 10 Bosw. (N. Y.) 362; Reed *v.* Copeland, 50 Conn. 472; Com. *v.* Crompton, 137 Pa. St. 138, s. c. 20 Atl. R. 417; Parker *v.* Bethel, etc., Co., (Tenn.) 34 S.W. R. 209. See, also, Brewster *v.* Hartley, 37 Cal. 15; Jarvis *v.* Rogers, 13 Mass. 105. But compare Matthews *v.* Hoagland, 48 N. J. Eq. 455, 21 Atl. Rep. 1054; Burrall *v.* Bushwick R. R. Co., 75 N. Y. 211; Sitgreaves *v.* Farmers', etc., Bank, 49 Pa. St. 359.

[5] McNeil *v.* Tenth Nat. Bank, 46 N. Y. 325; Cutting *v.* Damerel, 88 N. Y. 410; Walker *v.* Detroit, etc., R. R. Co., 47 Mich. 338; Bank of America *v.* McNeil, 10 Bush (Ky.) 54; Pennsylvania R. R. Co.'s Appeal, 86 Pa. St. 80; *Exparte* Sargent, L. R. 17 Eq. Cas. 273; Ortigosa *v.* Brown, 47 L. J. Ch. 168.

[6] Holbrook *v.* New Jersey Zinc Co., 57 N. Y. 616, 623; Broadway Bank *v.* McElrath, 13 N. J. Eq. 24; Bridgeport Bank *v.* New York, etc., R. R. Co., 30 Conn. 231; Otis *v.* Gardner, 105 Ill. 436; Colonial Bank *v.* Hepworth, 36 Ch. Div. 36.

[7] Cook on Stock and Stockholders, § 375; Allen *v.* South Boston R. R.,

§ 98. **Registry of transfer.**—It is generally provided that stock shall be transferred only upon the books of the company. Even where such a provision exists, however, a valid assignment of the certificate will estop the transferer from impeaching his transferee's title or that of any subsequent *bona fide* transferee, notwithstanding the fact that such assignment or transfer is not registered.[1] As to the corporation, however, where such a provision exists it is not bound to recognize as a stockholder a purchaser who does not have the transfer registered or properly apply for its registration.[2] But the corporation may waive a formal registry so far as its own rights are concerned.[3] And in many jurisdictions the rule is that a *bona fide*

150 Mass. 200, 22 N. E. Rep. 917. Such a power of attorney has been held irrevocable. Skinner *v.* Ft. Wayne, etc., R. Co., 58 Fed. R. 55.

[1] Noyes *v.* Spaulding, 27 Vt. 420; Black *v.* Zacherie & Co., 3 How. (U. S.) 483, 513; Johnson *v.* Laflin, 103 U. S. 800, 804; Continental Nat. Bank *v.* Eliot, etc., Bk., 7 Fed. R. 369; Baldwin *v.* Canfield, 26 Minn. 43; Merchants', etc., Bank *v.* Richards, 6 Mo. App. 454; Brown *v.* Smith, 122 Mass. 589; People's Bank *v.* Gridley, 91 Ill. 457; Duke *v.* Cahawba Nav. Co., 10 Ala. 82, s. c. 44 Am. Dec. 472; Noble *v.* Turner, 69 Md. 519; Ross *v.* Southwestern R. R. Co., 53 Ga. 514; Lund *v.* Wheaton, etc., Co., 50 Minn. 36, 52 N. W. R. 268; Cushman *v.* Thayer Mfg. Co., 76 N. Y. 365; Bruce *v.* Smith, 44 Ind. 1; Smith *v.* Nashville, etc., R. R. Co., 91 Tenn. 221, 18 S. W. R. 546. The same rule has been held to apply to the transferer's assignee in bankruptcy. Dickinson *v.* Central Nat. Bank, 129 Mass. 279; Sibley *v.* Quinsigamond Nat. Bank, 133 Mass. 515; *Ex parte* Dobson, 2 Mont. & D. (Eng. B. R.) 685.

[2] 1 Cook on Stock and Stockholders, § 381. As to the ordinary manner of registering the transfer, see Burrall *v.* Bushwick R. R. Co., 75 N. Y. 211; Green Mount, etc., Co. *v.* Bulla, 45 Ind. 1; National Bank *v.* Watsontown Bank, 105 U. S. 217. As to what is a sufficient registry or application in particular cases, see Plumb *v.* Bank, 48 Kan. 484, 29 Pac. R. 699; Chemical Nat. Bank *v.* Codwell, 132 N. Y. 250; American Nat. Bank *v.* Oriental Mills, 17 R. I. 551, 23 Atl. R. 795; Case *v.* Bank, 100 U. S. 446; Fisher *v.* Jones, 82 Ala. 117, 3 So. R. 13; Pinkerton *v.* Manchester, etc., R. R. Co., 42 N. H. 424; Newell *v.* Williston, 138 Mass. 240. Either party to the transfer is usually entitled to demand a registry. Johnston *v.* Laflin, 103 U. S. 800; Webster *v.* Upton, 91 U. S. 65.

[3] Cutting *v.* Damerel, 88 N. Y. 410; Isham *v.* Buckingham, 49 N. Y. 216; Robinson *v.* Nat. Bank, 95 N. Y. 637; Chambersburg Ins. Co. *v.* Smith, 11 Pa. St. 120; Richmondville Mfg. Co. *v.* Prall, 9 Conn. 487; Wilson *v.* St. Louis, etc., Co., 108 Mo. 588, s. c. 36 Am. & Eng. Corp. Cas. 290; Upton *v.* Burnham, 3 Biss. (U. S.) 431, 520; American Nat. Bank *v.* Oriental Mills, 17 R. I. 551, 23 Atl. R. 795.

purchaser of a share of stock for a valuable consideration is not affected by a subsequent attachment or levy upon stock for the debts of the transferer, nor, in general, by any subsequent equities, although the transfer has never been registered.[1] But this rule has not passed unchallenged,[2] and it does not, of course, apply to a purchaser of stock upon which a levy has been made before the purchase.[3] The corporation may, and should, generally, insist upon the surrender of the old certificate.[4] But when this is done and proper application made it is the duty of the company to register the transfer in the absence

[1] Continental Nat. Bank *v.* Eliot Nat. Bank, 7 Fed. R. 369; Scott *v.* Pequonnock Nat. Bank, 15 Fed. R. 494; Broadway Bank *v.* McElrath, 13 N. J. Eq. 24; Doty *v.* First Nat. Bank, 3 N. Dak. 9, 53 N. W. R. 77; Clark *v.* German, etc., Bank, 61 Miss. 611; Lund *v.* Wheaton, etc., Co., 50 Minn. 36, s. c. 36 Am. St. R. 623; Thurber *v.* Crump, 86 Ky. 408, s. c. 6 S. W. R. 145; Seeligson *v.* Brown, 61 Tex. 114; Smith *v.* Crescent City, etc., Co., 30 La. Ann. 1378; Kern *v.* Day, 45 La. 71, 12 So. R. 6; Comeau *v.* Guild Farm Oil Co., 3 Daly (N. Y.) 218; Smith *v.* American Coal Co., 7 Lans. (N. Y.) 317. At least where there is notice of the transfer. Bridgewater Iron Co. *v.* Lissberger, 116 U. S. 8; Scripture *v.* Francestown, etc., Co., 50 N. H. 571; Wilson *v.* St. Louis, etc., R. R. Co., 108 Mo. 588, s. c. 32 Am. St. R. 624; Telford, etc., Co. *v.* Gerhab, (Pa.) 13 Atl. R. 90, 21 Am. & Eng. Corp. Cas. 471; Commonwealth *v.* Watmough, 6 Whart. (Pa.) 117; Mowry *v.* Hawkins, 57 Conn. 453, s. c. 18 Alt. R. 784.

[2] Weston *v.* Bear River, etc., Co., 5 Cal. 186, s. c. 63 Am. Dec. 117; Conway *v.* John, 14 Colo. 30, s. c. 23 Pac. R. 170; State *v.* First Nat. Bank, 89 Ind. 302; Colman *v.* Spencer, 5 Blackf. (Ind.) 197; Oxford, etc., Co. *v.* Bunnel, 6 Conn. 552; Buttrick *v.* Nashua, etc., R. R. Co., 62 N. H. 413, s. c. 13 Am. St. R. 578; Skowhegan Bank *v.* Cutler, 49 Me. 315; *Re* Murphy, 51 Wis. 519, s. c. 8 N. W. R. 419; Fort Madison, etc., Co. *v.* Batavian Bank, 71 Iowa 270, s. c. 32 N. W. R. 336; Noble *v.* Turner, 69 Md. 519, 16 Atl. R. 124; Berney Nat. Bank *v.* Pinckard, 87 Ala. 577, s. c. 6 So. R. 364. But in several of these cases the statute explicitly altered the rule.

[3] Chesapeake and Ohio R. R. Co. *v.* Paine, 29 Gratt. (Va.) 502; Shenandoah Valley R. R. Co. *v.* Griffith, 76 Va. 913; Young *v.* South Tredegar, etc., Co., 85 Tenn. 189, s. c. 4 Am. St. R. 752.

[4] State *v.* New Orleans, etc., R. R. Co., 30 La. Ann. 308; Bank *v.* Lanier, 11 Wall. (U. S.) 369; New York & N. H. R. R. Co. *v.* Schuyler, 34 N. Y. 30; Brisbane *v.* Delaware, etc., R. R. Co., 94 N. Y. 204; Bridgeport Bank *v.* New York, etc., R. R. Co., 30 Conn. 231; Factors', etc., Co. *v.* Marine, etc., Co., 31 La. Ann. 149; Cleveland, etc., R. R. Co. *v.* Robbins, 35 Ohio St. 483; National Bank *v.* Lake Shore, etc., R. R. Co., 21 Ohio St. 221; Supply Ditch Co. *v.* Elliott, 10 Colo. 327, s. c. 3 Am. St. R. 586; Tafft *v.* Presidio R. R. Co., 84 Cal. 131, s. c. 22 Pac. R. 485, 18 Am. St. R. 166.

of some legal excuse.[1] Where a corporation wrongfully refuses to make or permit the registry of a transfer the party entitled thereto usually has his remedy by suit in equity,[2] but he may, if he so elects, bring an action at law for damages,[3] and, in some jurisdictions, it is also held that mandamus will lie to compel the corporation to make or permit a registration.[4]

[1] As to what will justify refusal, see Gould *v.* Head, 41 Fed. R. 240; People *v.* Sterling Mfg. Co., 82 Ill. 457; Telegraph Co. *v.* Davenport, 97 U. S. 369; Merchants' Nat. Bank *v.* Richards, 6 Mo. App. 454; 2 Beach on Private Corp., § 654. As to what will not justify refusal, see Helm *v.* Swiggett, 12 Ind. 194; Kahn *v.* St. Joseph Bank, 70 Mo. 262; State, *ex rel.* Townsend, *v.* McIver, 2 S. C. 25; People *v.* Paton, 5 N. Y. St. R. 316; Moffatt *v.* Farquhar, L.R. 7 Ch. Div. 591; American, etc., Co. *v.* Bayless, 91 Ky. 94, 15 S. W. R. 10.

[2] Cushman *v.* Thayer Mfg. Co., 76 N. Y. 365; Shinner *v.* Ft. Wayne, etc., R. R. Co., 58 Fed. R. 55; Mechanics' Bank *v.* Seton, 1 Pet. (U. S.) 299; Wilson *v.* Atlantic, etc., R. R. Co., 2 Fed. R. 459; Iasigi *v.* Chicago, etc., R. R. Co., 129 Mass. 46; Iron R. R. Co. *v.* Fink, 41 Ohio St. 321, s. c. 52 Am. R. 84; 1 Cook on Stock and Stockholders, § 391. In Gould *v.* Head, 41 Fed. R. 240, the suit was against the secretary and it was held that the corporation was not a necessary party.

[3] Rio Grande, etc., Co. *v.* Burns, 82 Tex. 50, s. c. 17 S. W. R. 1043; Kimball *v.* Union Water Co., 44 Cal. 173, s. c. 13 Am. R. 157; Doty *v.* First Nat. Bank, 3 N. Dak. 9, 53 N. W. R. 77; Sargent *v.* Franklin Ins. Co., 8 Pick. (Mass.) 90, s. c. 19 Am. Dec. 306; Helm *v.* Swiggett, 12 Ind. 194; Kortwright *v.* Buffalo, etc., Bank, 20 Wend. (N. Y.) 90; 2 Thomp. Corp., § 2447, *et seq.*

[4] Green Mount, etc., Co. *v.* Bulla, 45 Ind. 1; State *v.* First Nat. Bank, 89 Ind. 302; State *v.* Cheraw, etc., R. R. Co., 16 S. C. 524; People *v.* Goss, etc., Co., 99 Ill. 355; Slemmons *v.* Thompson, 23 Ore. 215, 31 Pac. R. 514; Goodwin *v.* Ottawa, etc., Ry. Co., 13 Upper Can. (C. P.) 254; Norris *v.* Irish Land Co., 8 El. & Bl. 512. It has been said that this remedy is peculiarly appropriate in the case of railroads on account of their *quasi* public nature. State, *ex rel.* Townsend, *v.* McIver, 2 S. C. 25. But, although we believe that, in many cases, where the shares have comparatively little value or an emergency exists, mandamus ought to lie, yet we do not believe that the distinction referred to in the case last cited exists, as the rights of the members are substantially the same as in ordinary private corporations. See Stackpole *v.* Seymour, 127 Mass. 104. The following cases hold that mandamus will not lie: Shipley *v.* Mechanics' Bank, 10 Johns. (N.Y.) 484; Freon *v.* Carriage Co., 42 Ohio St. 30, s. c. 51 Am. Rep. 794; Townes *v.* Nichols, 73 Me. 515; State *v.* Guerrero, 12 Nev. 105; Tobey *v.* Hakes, 54 Conn. 274, s.c. 1 Am. St. R. 114; Birmingham, etc., Co. *v.* Commonwealth, 92 Pa. St. 72; State *v.* Rombauer, 46 Mo. 155; Baker *v.* Marshall, 15 Minn. 177; State *v.* People's, etc., Ass'n, 43 N. J. L. 389; Rex *v.* Bank, 2 Doug. 524; Rex *v.* London, etc., Co., 1 Dowl. & R. 510.

§ 99. **Lien of corporation on stock.**—A corporation has, at common law, no lien upon a shareholder's stock for debts due from him to it.[1] Such a lien is given by general statutes in many of the states,[2] and is frequently given by charter.[3] It may be created also, when authorized, by a by-law of the corporation,[4] but many of the courts hold that, if created in this way, it will not bind a *bona fide* purchaser, without notice that

[1] Farmers', etc., Bank *v.* Wasson, 48 Ia. 336, s. c. 30 Am. R. 398; Bank of Holly Springs *v.* Pinson, 58 Miss. 421, s. c. 38 Am. R. 330; Massachusetts Iron Co. *v.* Hooper, 7 Cush. (Mass.) 183; Sargent *v.* Franklin Ins. Co., 8 Pick. (Mass.) 90, s. c. 19 Am. Dec. 306; Gemmell *v.* Davis, 75 Md. 546, s. c. 23 Atl. R. 1032, 32 Am. St. R. 412; Driscoll *v.* West Bradley, etc., Co., 59 N. Y. 96; Hagar *v.* Union Nat. Bank, 63 Me. 509; Williams *v.* Lowe, 4 Neb. 382; Merchants' Bank *v.* Shouse, 102 Pa. St. 488; Carroll *v.* Mullanphy, etc., Bank, 8 Mo. App. 249; Case *v.* Bank, 100 U. S. 446.

[2] Stimson's Am. Stat. (1892), § 8148, citing the statutes; Pittsburgh, etc., R. Co. *v.* Clarke, 29 Pa. St. 146, construing the Pennsylvania statute requiring payment of the shareholder's indebtedness to the corporation before transfer of shares in a railway corporation unless the lien is waived. Liens upon shares are forbidden by statute in New Hampshire. Hill *v.* Pine River Bank, 45 N. H. 300, 309. A corporation has no special vendor's lien, in the absence of a contract to that effect, on shares or its capital stock, for unpaid purchase-money. Lankershim Ranch Land & W. Co. *v.* Herberger, 82 Cal. 600. A statute may create a lien in favor of the corporation for debts due from shareholders prior to its enactment. Birmingham Trust, etc., Co. *v.* East Lake Land Co., 99 Ala. 379, 13 So. R. 72. See, also, Hammond *v.* Hastings, 134 U. S. 401, s. c. 10 Sup. Ct. R. 727; Oliphint *v.* Bank, 60 Ark. 198, 29 S. W. R. 460.

[3] Leggett *v.* Bank, 24 N. Y. 283; Reese *v.* Bank, 14 Md. 271, s. c. 74 Am. Dec. 536; German, etc., Bank *v.* Jefferson, 10 Bush (Ky.) 326; Cross *v.* Phenix Bank, 1 R. I. 39; Sabin *v.* Bank, 21 Vt. 353; Kenton Ins. Co. *v.* Bowman, 84 Ky. 430, 1 S. W. R. 717; Bohmer *v.* City Bank, 77 Va. 445; Bradford, etc., Co. *v.* Briggs, L. R. 12 App. Cas. 29.

[4] Reading Trust Co. *v.* Reading Iron Works, 137 Pa. St. 282; St. Louis Perpetual Ins. Co. *v.* Goodfellow, 9 Mo. 149; Mechanics' Bank *v.* Merchants' Bank, 45 Mo. 513; Tuttle *v.* Walton, 1 Ga. 43; Cunningham *v.* Alabama, etc., Co., 4 Ala. 652; Farmers', etc., Bank *v.* Haney, 87 Iowa 101, 54 N.W. R. 61; Bank of Holly Springs *v.* Pinson, 58 Miss. 421, s. c. 38 Am. R. 330; Young *v.* Vough, 23 N. J. Eq. 325; Lockwood *v.* Mechanics' Nat. Bank, 9 R. I. 308, s. c. 11 Am. R. 258; 1 Cook on Stock and Stockholders, § 522; 2 Beach on Private Corp., § 644; 1 Morawetz on Corp., § 201. It has also been held that such a lien may be created by contract. Jennings *v.* Bank, 79 Cal. 323; Vansands *v.* Middlesex Co. Bank, 26 Conn. 144; Farmers', etc., Bank *v.* Haney, 87 Iowa 101, 54 N. W. R. 61. Or by usage. Morgan *v.* Bank, 8 Yerg. & R. (Pa.) 73, s. c. 11 Am. Dec. 575, and note. But this would not bind a *bona fide* purchaser without notice.

such a by-law existed,[1] for such a by-law, unless recited in the certificate, will not amount to constructive notice.[2] Authority to make "regulations" as to transfers has been held sufficient to empower the directors of a corporation to make a by-law reserving such a lien.[3] "Where, by general law, a lien is given to a corporation upon its stock for the indebtedness of the stockholder, it is valid and enforceable against all the world."[4]

§ 100. **When and to what the lien attaches.**—It may attach to the stock for the owner's debts, although registered in another's name;[5] and it will take priority over antecedent debts which the stock has been pledged to secure, if the pledgee has failed to notify the corporation of his interest.[6] No action of the directors is necessary to fix the lien upon stock owned by its debtor.[7] It will attach to trust stock for debts of a trustee holding the stock in his own name, there being nothing in the way of notice to the corporation of the nature of his title.[8] The lien attaches to dividends as well as to stock, and

Driscoll *v.* West Bradley, etc., Co., 59 N. Y. 96; Bryon *v.* Carter, 22 La. Ann. 98.

[1] This is true of New York, Louisiana, Massachusetts, Alabama, Pennsylvania, California, Mississippi and Ohio, and probably some others. 1 Cook on Stock and Stockholders, § 522. See, also, Bank *v.* Lanier, 11 Wall. 369; Kisterbock's Appeal, 127 Pa. St. 601, s. c. 14 Am. St. R. 868. Bank of Holly Springs *v.* Pinson, 58 Miss. 421, s. c. 38 Am. R. 330; Brinkerhoff-Farris Trust, etc., Co. *v.* Home, etc., Co., 118 Mo. 447, s. c. 24 S. W. R. 129, and 23 Am. & Eng. Ency. of Law 691.

[2] 1 Cook on Stock and Stockholders, § 532; Brinkerhoff-Ferris Trust, etc., Co. *v.* Home, etc., Co., 118 Mo. 447, s. c. 24 S. W. R. 129.

[3] Spurlock *v.* Pacific R. Co., 61 Mo. 319; Cunningham *v.* Alabama, etc., Co., 4 Ala. 652; McCready *v.* Rumsey, 6 Duer (N. Y.) 574; Pendergast *v.* Bank, 2 Sawy. (U. S.) 108. But see Bank of Attica *v.* Manufacturers', etc., Bank, 20 N. Y. 501; Bank *v.* Durfee, 118 Mo. 431, s. c. 24 S. W. R. 133.

[4] Hammond *v.* Hastings, 134 U. S. 401, s. c. 10 Sup. Ct. R. 727, 2 Lewis's Am. R. R. & Corp. R. 698, and authorities there cited. To the same effect, see Bishop *v.* Globe Co., 135 Mass. 132; Bohmer *v.* City Bank, 77 Va. 445.

[5] Stebbins *v.* Phœnix F. Ins. Co., 3 Paige (N. Y.) 350. See, also, Mount Holley Paper Co.'s Appeal, 99 Pa. St. 513; Planters', etc., Co. *v.* Selma Sav. Bank, 63 Ala. 585. But compare Helm *v.* Swiggett, 12 Ind. 194.

[6] Platt *v.* Birmingham Axle Co., 41 Conn. 255, 264; Union Bank *v.* Laird, 2 Wheat. (U. S.) 390. See where notice is given, Bradford, etc., Co. *v.* Briggs, 56 L. T. Rep. 62; Gemmell *v.* Davis, 75 Md. 546, 23 Atl. Rep. 1032.

[7] Elliott *v.* Sibley, 101 Ala. 344, 13 So. Rep. 500.

[8] Young *v.* Vough, 23 N. J. Eq. 325;

they may be retained by the corporation to discharge a debt due it from the shareholder,[1] and the lien may be enforced, whether the debts are due, or are to become due at some future time.[2] But it has been held that no lien attaches for debts of a holder of certificates who has re-transferred them without obtaining registry.[3]

§ 101. **Waiver of lien—Enforcement of lien.**—The right to a lien is given exclusively for the benefit of the corporation,[4] and can not be enforced by any one else. It can not even be enforced indirectly by assignment of another's claim to the corporation that it may enforce payment for his benefit.[5] But a surety of the stockholder, who has been compelled to discharge such a lien, is subrogated to the rights of the corporation.[6] The corporation may waive its lien and proceed by other means to collect the debt,[7] or at its election it may enforce it against

New London, etc., Bank *v.* Brocklebank, L. R. 21 Ch. Div. 302. Compare Bradford, etc., Co. *v.* Briggs, L. R. 12 App. Cas. 29.

[1] 1 Cook on Stock and Stockholders, § 526; Hagar *v.* Union Nat. Bank, 63 Me. 509; Sargent *v.* Franklin Ins. Co., 8 Pick. (U. S.) 90, s. c. 19 Am. Dec. 306; Bates *v.* N. Y., etc., Co., 3 Johns. Cas. (N. Y.) 238. See Gemmell *v.* Davis, 75 Md. 546, s. c. 23 Atl. Rep. 1032, 32 Am. St. Rep. 412, and compare Brent *v.* Bank, 2 Cranch C. C. (U. S.) 517.

[2] Pittsburgh, etc., R. Co. *v.* Clarke, 29 Pa. St. 146; St. Louis, etc., Ins. Co. *v.* Goodfellow, 9 Mo. 149; Cunningham *v.* Alabama, etc., Co., 4 Ala. 652. The lien is not lost, even though the statute of limitations should interpose as a bar to an action on the debt. Geyer *v.* Western Ins. Co., 3 Pittsb. (Pa.) 41; Farmers' Bank *v.* Iglehart, 6 Gill (Md.) 50.

[3] Helm *v.* Swiggett, 12 Ind. 194. But see first note to this section, *supra*.

[4] 1 Cook on Stock and Stockholders, § 529. Bank of Utica *v.* Smalley, 2 Cowen (N. Y.) 770, s. c. 14 Am. Dec. 526.

[5] White's Bank *v.* Toledo, etc., Ins. Co., 12 Ohio St. 601.

[6] Young *v.* Vough, 23 N. J. Eq. 325; Petersburg Sav., etc., Co. *v.* Lumsden, 75 Va. 327. See, also, Gray *v.* Stone, 69 L. T. R. 282. But compare Cross *v.* Phenix Bank, 1 R. I. 39.

[7] *In re* Hoylake R. Co., L. R. 9 Chan. App. C. 257, 259. 1 Cook on Stock and Stockholders, § 531. A corporation may waive a lien on its stock, but ignorance of the existence of the lien, on the part of the purchaser, does not destroy the lien and does not constitute waiver on part of the corporation. Hammond *v.* Hastings, 134 U. S. 401, s. c. 10 Sup. Ct. R. 727. See generally, as to waiver, Cecil Nat. Bank *v.* Watsontown Bank, 105 U. S. 217; First Nat. Bank *v.* Hartford, etc., Co., 45 Conn. 22; Hill *v.* Pine River Bank, 45 N. H. 300; Kenton Ins. Co. *v.* Bowman, 84 Ky. 430; Bishop *v.* Globe Co., 135 Mass. 132.

135 Mass. 132; Des Moines, etc., Co. *v.* Des Moines, etc., Bank, (Ia.) 66 N. W. R. 914.

shares in the hands of the debtor as liens are enforced against other property.[1] It has been held that the waiver of the lien will not release a surety unless he has given the corporation express notice not to waive it.[2] The ordinary method of enforcing its lien against shares which have been sold by the debtor is by a refusal to transfer the stock.[3] The corporation can not hold the purchaser personally liable.[4] And it can not hold a lien on stock for the debts of a registered stockholder contracted after it has been regularly notified that he has sold such stock and transferred the certificates.[5]

[1] Brent *v.* Bank of Washington, 10 Peters(U. S.)596. Foreclosure and sale or attachment, Sabin *v.* Bank, 21 Vt. 353; Farmers' Bank of Maryland's Case, 2 Bland's Ch. (Md.) 394; *In re* Morrison, 10 Nat. Bank Reg. 105.

[2] Perrine *v.* Fireman's Ins. Co., 22 Ala. 575.

[3] Reese *v.* Bank, 14 Md. 271, s. c. 74 Am. Dec. 536; Mechanics' Bank *v.* Merchants' Bank, 45 Mo. 513, s. c. 100 Am. Dec. 388; First Nat. Bank of Hartford *v.* Hartford, etc., Co., 45 Conn. 22; Bohmer *v.* City Bank, 77 Va. 445.

[4] 2 Cook on Stock and Stockholders, § 530.

[5] Conant *v.* Reed, 1 Ohio St. 298; Nesmith *v.* Washington Bank, 6 Pick. (Mass.) 324; Bank of America *v.* McNeil, 10 Bush (Ky.) 54. See Gemmell *v.* Davis, 75 Md. 546; 23 Atl. Rep. 1032.

CHAPTER VII.

SUBSCRIPTIONS.

§ 102. Preliminary agreements to subscribe.
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104. Construction of contract of subscription.
105. Contracts of subscription are several.
106. Effect of statutes requiring cash deposit to complete subscription.
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108. Presumption that one whose name is subscribed is a stockholder.
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127. Fraudulent representations in obtaining subscriptions.
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129. Fraud may be shown by parol evidence.
130. Subscriber must be free from negligence in order to be released upon the ground of fraud.
131. Subscription induced by fraud is merely voidable — When it will be enforced.
132. Ratification and estoppel — Rescission.

§ 102. **Preliminary agreements to subscribe.**—It frequently happens, especially where corporations are formed under general laws, that, prior to their incorporation, a preliminary agreement is made by those who are interested, to take a certain amount of stock.[1] There is a sharp conflict among the authorities as to the effect of such agreements and the liability of those who execute them. A distinction is sometimes drawn between an agreement *to subscribe*, and a present subscription or agreement stating that each subscriber "hereby subscribes" a certain sum, or the like;[2] but while this is doubtless good law where the facts justify such a distinction, it would seem that although the company is not yet incorporated and the agreement is made in contemplation of its future incorporation, yet if each one who signs the agreement relies and must rely upon each and every other party thereto in order to obtain the means to incorporate and carry out the purposes of the agreement, the effect is practically the same, no matter whether the agreement is in terms that they agree to subscribe a certain amount

[1] This is often contemplated by the stututory scheme of incorporation, even where there is no express provision upon the subject. Thus, in Anderson *v.* New Castle, etc., R. R. Co., 12 Ind. 376, s. c. 74 Am. Dec. 218, it is said: "Under the general railroad law, subscriptions of a certain amount of stock are necessary for the organization of the contemplated corporation, and for that reason and purpose are valid before the corporation is organized, and may be collected by it after organization." See, also, Hughes *v.* Antietam, etc., Co., 34 Md. 316; Cross *v.* Pickneyville, etc., Co., 17 Ill. 54; Hamilton, etc., Co. *v.* Rice, 7 Barb. (N. Y.) 157.

[2] See Mt. Sterling, etc., Co. *v.* Little, 14 Bush (Ky.) 429; Lake Ontario, etc., R. R. Co. *v.* Curtiss, 80 N. Y. 219; Strasburg R. R. Co. *v.* Echternacht, 21 Pa. St. 220. In such a case it is held that while the agreement does not amount to a subscription which can be enforced, yet the corporation may recover from the signer the damages caused by his failure to accept and pay for the stock, which should be measured, however, not by the par value of the stock but by the difference between its par value and its market value. Thrasher *v.* Pike County R. R. Co., 25 Ill. 340 (393 orig. ed.) See, also, Stowe *v.* Flagg, 72 Ill. 397, 402; Rhey *v.* Ebensburg, etc., Co., 27 Pa. St. 261; Peninsular R. Co. *v.* Duncan, 28 Mich. 130; Cartwright *v.* Dickinson, 88 Tenn. 476; Lake Ontario, etc., R. R. Co. *v.* Curtiss, 80 N. Y. 219, (intimating that one of the parties to the agreement, if made for his benefit, could bring such an action and that the measure of damages would be as above stated). The preliminary agreement may, of course, be so worded as to be binding only in case a *de jure* corporation is formed. Capps *v.* Hastings, etc., Co., (Neb.) 58 N. W. Rep. 956.

or that they do subscribe a certain amount.[1] In either case, if a signer of the agreement receives shares after the company is incorporated, pays calls, takes part in the corporate proceedings, or otherwise ratifies the subscription, the corporation, after also ratifying it, may hold him liable the same as any other subscriber.[2] Upon this proposition there is substantial unanimity among the authorities, although it is sometimes said that a corporation not in existence at the time a contract is made can not become a party to it so far as to enforce it after the incorporation,[3] and, in a recent Massachusetts case the rule is broadly stated that although a contract is made in the name and for the benefit of a projected corporation, it can not, after its organization, become a party to the contract even by adoption or ratification of it.[4] But the better rule is that such an agreement, if not a completed contract, is at least a continuing offer made for the benefit of the corporation, which is practically the aggregate of the individuals who entered into the agreement upon the faith of each other's subscription, and that the corporation may adopt and enforce it.[5] The statute

[1] See Cook on Stock and Stockholders, § 75; 1 Thomp. Corp., §§ 1164, 1165; Auburn, etc., Asso. *v.* Hill, (Cal.) 45 Pac. R. 695.

[2] Tonica, etc., R. R. Co. *v.* McNeely, 21 Ill. 71; Cross *v.* Pickneyville, etc., R. R. Co., 17 Ill. 54; Maltby *v.* Northwestern, etc., R. R. Co., 16 Md. 422; Inter Mountain Pub. Co. *v.* Jack, 5 Mont. 568; Rockville, etc., Co. *v.* Van Ness, 2 Cranch C. C. (U. S.) 449; Kansas City Hotel Co. *v.* Hunt, 57 Mo. 126; Bell's Appeal, 115 Pa. St. 88; Buffalo & J. R. R. Co. *v.* Gifford, 87 N. Y. 294; Buffalo & N. Y. City R. R. Co. *v.* Dudley, 14 N. Y. 336; Twin Creek, etc., Co. *v.* Lancaster, 79 Ky. 552; Kennebec, etc., R. R. Co. *v.* Palmer, 34 Me. 366; Penobscot R. R. Co. *v.* Dummer, 40 Me. 172; McCormick *v.* Gas Co., 48 Kan. 614; Red Wing Hotel Co. *v.* Freidrich, 26 Minn. 112; Minneapolis, etc., Co. *v.* Davis, 40 Minn. 110; International, etc., Ass'n *v.* Walker, 83 Mich. 386, 47 N. W. Rep. 338, s. c. 3 Lewis Am. R. R. & Corp. Rep. 731, and note, where the authorities are collected and reviewed.

[3] Lake Ontario, etc., Co. *v.* Curtiss, 80 N. Y. 219; Mt. Sterling, etc., Co. *v.* Little, 14 Bush (Ky.) 429; Pittsburgh, etc., R. R. Co. Gazzam, 32 Pa. St. 340; Charlotte, etc., R. R. Co. *v.* Blakely, (S. Car.) 3 Strob. 245; and note to Winston *v.* Dorsett, etc., Co., 129 Ill. 64, 4 L. R. A. 507, 508. See, also, Rikhoff *v.* Machine Co., 68 Ind. 388.

[4] Abbott *v.* Hapgood, 150 Mass. 248, s. c. 22 N. E. Rep. 907.

[5] Marysville, etc., Co. *v.* Johnson, 93 Cal. 538, 6 Lewis Am. R. R. & Corp. Rep. 9; Ashuelot Shoe Co. *v.* Hoit, 56 N. H. 548; Lake Ontario, etc., R. R. Co. *v.* Mason, 16 N. Y. 451; Buffalo, etc., R. R. Co. *v.* Clark, 22 Hun (N. Y.) 359; Nulton *v.* Clayton, 54 Iowa 425, s. c. 37

may, however, provide that subscriptions shall be made by signing the articles of incorporation, with certain other formalities, and it has been held that in such a case one who has merely signed a preliminary agreement, and has not signed or joined in the execution of the articles of incorporation in the manner provided by statute, can not be held liable upon the incomplete subscription or agreement.[1] It is also urged, in support of this doctrine, and, indeed, in support of the broader doctrine announced in some of the cases, which requires a ratification by the corporation and the alleged stockholder, before he can be held liable as a subscriber, that, as every contract must be mutually binding upon both parties, the corporation can not enforce such an agreement because it is not itself bound thereby.[2] In line with these decisions, it has also been held that one who signs such an agreement may withdraw befor acceptance by the corporation,[3] but this would, in some

Am. Rep. 213; Auburn, etc., Ass'n *v.* Hill, (Cal.) 32 Pac. Rep. 587; Heaston *v.* Cincinnati, etc., R. R. Co., 16 Ind. 275; Miller *v.* Wild Cat, etc., Co., 52 Ind. 51; note to Winston *v.* Dorsett, etc., Co., 129 Ill. 64, 4 L. R. A. 507, and authorities cited in note 2, *ante* p. 154. In no case, perhaps, is this more clearly stated than it is by the Supreme Court of Massachusetts in the case of Athol Music Hall Co. *v.* Carey, 116 Mass. 471, and yet this is difficult to reconcile with the extreme rule that a corporation can not ratify a contract made for its benefit, announced in Abbott *v.* Hapgood, 150 Mass. 248, heretofore cited.

[1] Coppage *v.* Hutton, 124 Ind. 401, s. c. 24 N. E. Rep. 112, 7 L. R. A. 591; Reed *v.* Richmond St. R. R. Co., 50 Ind. 342; Dutchess, etc., R. R. Co. *v.* Mabbett, 58 N. Y. 397; Poughkeepsie, etc., R. R. Co. *v.* Griffin, 24 N. Y. 150; Troy & Boston R. R. Co. *v.* Tibbits, 18 Barb. (N. Y.) 297; Erie, etc., R. R. Co. *v.* Owen, 32 Barb. (N. Y.) 616; Sedalia, etc., R. R. Co. *v.* Wilkerson, 83 Mo. 235; Parker *v.* Northern Cent., etc., R. R. Co., 33 Mich. 23; Carlisle *v.* Saginaw, etc., R. R. Co., 27 Mich. 315; Monterey, etc., R. R. Co. *v.* Hildreth, 53 Cal. 123; Butcher *v.* Dillsburg, etc., R. R. Co., 76 Pa. St. 306. But see McClure *v.* People's Freight Ry. Co., 90 Pa. St. 269; Buffalo & J. R. R. Co. *v.* Gifford, 87 N. Y. 294.

[2] Strasburg R. R. Co. *v.* Echternacht, 21 Pa. St. 220, s. c. 60 Am. Dec. 49; Gleaves *v.* Brick Church Co., 1 Sneed, (Tenn.) 491; Goff *v.* Winchester College, 6 Bush (Ky.) 443; Monterey, etc., R. R. Co. *v.* Hildreth, 53 Cal. 123; Fanning *v.* Insurance Co., 37 Ohio St. 339, s. c. 41 Am. Rep. 517. But compare Shober *v.* Lancaster, etc., Ass'n, 68 Pa. St. 429, and Edinboro Academy *v.* Robinson, 37 Pa. St. 210, s. c. 78 Am. Dec. 421, with the Pennsylvania case above cited. While some of the cases in which this rule is stated were, perhaps, correctly decided, yet we think the broad doctrine they announce is unsound in principle and upon authority.

[3] Garrett *v.* Dillsburg, etc., R. R. Co., 78 Pa. St. 465; Auburn Bolt and

ment by one to accept so many shares as should be allotted to him, and sending to the company's banker a sufficient deposit to cover the advancement required upon a subscription to such shares, although it is acted upon by the corporation and a certain number of shares are allotted, and the rest of his deposit returned, is not sufficient to constitute him a stockholder until he has accepted the shares, although his name is placed upon the register as a stockholder, and he has notice that his certificates of stock are ready for him, and he requests that they be forwarded to him.[1]

§ 104. **Construction of contract of subscription.**—Where the place of performance is not specified in a contract made in one state to subscribe for shares of stock of a railroad company incorporated under the laws of another state where it has its road and treasury, the contract is to be performed in the latter state and is to be construed by its laws.[2] It is a well established rule that the construction of a written contract is for the court, and this is true of a contract of subscription.[3] But, on the other hand, questions of ratification and intention are usually questions of fact for the jury, and it has been held that the intention of an alleged subscriber to take stock as a subscriber, or to ratify an insufficient subscription, or an act of the corporation treating him as a subscriber, is a question of fact for the jury.[4]

§ 105. **Contracts of subscription are several.**—Contracts of subscription, as usually made, are several and not joint.[5] This

Co., 35 Ala. 33. But see Phœnix, etc., Co. *v.* Badger, 67 N. Y. 294; Buffalo, etc., R. R. Co. *v.* Gifford, 87 N. Y. 294; Jewell *v.* Rock River, etc., Co., 101 Ill. 57, and compare Grangers', etc., Co. *v.* Vinson, 6 Oreg. 172.

[1] New Brunswick, etc., R. Co. *v.* Muggeridge, 4 H. & N. 160.

[2] Penobscot & K. R. R. Co. *v.* Bartlett, 12 Gray (Mass.) 244, s. c. 71 Am. Dec. 753.

[3] Monadnock R. R. Co. *v.* Felt, 52 N. H. 379; 1 Elliott's Gen. Pr., § 431.

[4] Philadelphia, etc., R. R. Co. *v.* Cowell, 28 Pa. St. 329, s. c. 70 Am. Dec. 128; Galveston, etc., Co. *v.* Bolton, 46 Tex. 633; McComb *v.* Barcelona, etc., Ass'n, 134 N. Y. 598.

[5] Whittlesey *v.* Frantz, 74 N. Y. 456; Wayne, etc., Inst. *v.* Smith, 36 Barb. (N. Y.) 576; Herron *v.* Vance, 17 Ind. 595; Connecticut, etc., R. R. Co. *v.* Bailey, 24 Vt. 465, s. c. 58 Am. Dec. 181; Gibbons *v.* Grinsel, 79 Wis. 365;

informal it may be.[1] Indeed, it would seem that a parol subscription may be valid,[2] and merely accepting and holding a certificate of stock is, ordinarily, sufficient to make one liable as a stockholder,[3] or if he assumes the duties and claims the rights of a stockholder, and acts as such with the acquiescence and consent of the corporation,[4] it is sufficient to bind both him and the corporation. But the charter or statute may require subscriptions to be made in a specified manner; and, unless there is a subsequent ratification, express or implied, by the parties, the statute must be substantially complied with in order to hold the subscriber.[5] It has also been held that an agree-

[1] Fry *v.* Lexington, etc., R. R. Co., 2 Met. (Ky.) 314; Nulton *v.* Clayton, 54 Iowa 425, s. c. 37 Am. Rep. 213; Phœnix, etc., R. R. Co. *v.* Badger, 67 N. Y. 294; Cayuga, etc., R. R. Co. *v.* Kyle, 64 N. Y. 185; Hagerstown, etc., Co. *v.* Creeger, 5 Harr. & J. (Md.) 122, s. c. 9 Am. Dec. 495; Woodruff *v.* McDonald, 33 Ark. 97; Stuart *v.* Valley R. R. Co., 32 Gratt. (Va.) 146; Ogdensburgh, etc., R. R. Co. *v.* Frost, 21 Barb. (N. Y.) 541; Melvin *v.* Lamar Ins. Co., 80 Ill. 446, s. c. 22 Am. Rep. 199; State *v.* Beck, 81 Ind. 500; Ottawa, etc., R. R. Co. *v.* Black, 79 Ill. 262; Oler *v.* Baltimore, etc., R. R. Co., 41 Md. 583; Brownlee *v.* Ohio, etc., R. R. Co., 18 Ind. 68; Ashtabula, etc., R. R. Co. *v.* Smith, 15 Ohio St. 328, and note to Parker *v.* Thomas, 81 Am. Dec. 385, 395. But see McClelland *v.* Whiteley, 15 Fed. Rep. 322.

[2] Cook on Stock and Stockholders, § 52; Colfax, etc., Co. *v.* Lyon, 69 Iowa 683, s. c. 29 N. W. Rep. 780. If it may be performed within a year, it is not within the statute of frauds. Bullock *v.* Falmouth, etc., Co., 85 Ky. 184, s. c. 3 S. W. Rep. 129; Straughan *v.* Indianapolis, etc., R. R. Co., 38 Ind. 185. But see Pittsburgh, etc., Co. *v.* Gazzam, 32 Pa. St. 340; Vreeland *v.* New Jersey, etc., Co., 29 N. J. Eq. 188; Fanning *v.* Ins. Co., 37 Ohio St. 339, s. c. 41 Am. Rep. 517.

[3] Upton *v.* Tribilicock, 91 U. S. 45; Stutz *v.* Handley, 41 Fed. Rep. 531; McLaughlin *v.* Detroit, etc., R. R. Co., 8 Mich. 99. See, also, Shickle *v.* Watts, 94 Mo. 410, 7 S.W. Rep. 274; Clark *v.* Continental, etc., Co., 57 Ind. 135; Hamilton, etc., Co. *v.* Rice, 7 Barb. (N. Y.) 157; Lane *v.* Brainerd, 30 Conn. 565; Nulton *v.* Clayton, 54 Iowa 425; Rensselaer, etc., R. Co. *v.* Barton, 16 N. Y. 457.

[4] Such acts operate as an estoppel to deny his membership in the company. Boston, etc., R. Co. *v.* Wellington, 113 Mass. 79; Philadelphia, etc., R. Co. *v.* Cowell, 28 Penn. St. 329; Jewell *v.* Rock River, etc., Co., 101 Ill. 57; Griswold *v.* Seligman, 72 Mo. 110; Cheltenham, etc., R. Co. *v.* Daniel, 2 Q. B. 281; Wheeler *v.* Millar, 90 N. Y. 353; Sanger *v.* Upton, 91 U. S. 56. But see Shields *v.* Casey, 155 Pa. St. 253.

[5] Coppage *v.* Hutton, 124 Ind. 401, s. c. 24 N. E. Rep. 112; Reed *v.* Richmond St. R. R. Co., 50 Ind. 342; Bucher *v.* Dillsburg, etc., R. R. Co., 76 Pa. St. 306; Dutchess, etc., R. R. Co. *v.* Mabbett, 58 N. Y. 397; Ashtabula, etc., R. R. Co. *v.* Smith, 15 Ohio St. 328; Eppes *v.* Mississippi, etc., R. R.

ment by one to accept so many shares as should be allotted to him, and sending to the company's banker a sufficient deposit to cover the advancement required upon a subscription to such shares, although it is acted upon by the corporation and a certain number of shares are allotted, and the rest of his deposit returned, is not sufficient to constitute him a stockholder until he has accepted the shares, although his name is placed upon the register as a stockholder, and he has notice that his certificates of stock are ready for him, and he requests that they be forwarded to him.[1]

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[3] Monadnock R. R. Co. *v.* Felt, 52 N. H. 379; 1 Elliott's Gen. Pr., § 431.

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[5] Whittlesey *v.* Frantz, 74 N. Y. 456; Wayne, etc., Inst. *v.* Smith, 36 Barb. (N. Y.) 576; Herron *v.* Vance, 17 Ind. 595; Connecticut, etc., R. R. Co. *v.* Bailey, 24 Vt. 465, s. c. 58 Am. Dec. 181; Gibbons *v.* Grinsel, 79 Wis. 365;

is true, ordinarily, even where they are joint in form, because it is clear from the nature of the contract that each subscriber intends to bind himself alone for his own subscription, and this intention must prevail notwithstanding the joint form of the promise.[1] In accordance with this rule it has even been held that where one person makes two subscriptions in two different capacities, that is, as an individual and as a trustee, a separate action must be brought to enforce each subscription.[2]

§ 106. **Effect of statutes requiring cash deposit to complete subscription.**—Several of the states by general statute[3] require that a certain sum shall be paid upon each share of stock at the time of subscribing, and such a provision is frequently found in special charters and in by-laws. It is generally held that an entire omission to make such a payment at the time of subscribing will not render the subscription absolutely void so that the subscriber can defend against payment of it for this cause,[4] since this would be permitting him to take advantage of his own wrong in failing to pay.[5] The theory of these cases is that the requirement is made for the benefit of the corpora-

Robertson *v.* March, 4 Ill. 198; Miller *v.* Preston, 4 N. Mex. 314.

[1] Clark on Contracts, 605; Landwerlen *v.* Wheeler, 106 Ind. 523; Davis *v.* Belford, 70 Mich. 120, s. c. 37 N. W. R. 919; Price *v.* Grand Rapids, etc., R. R. Co., 18 Ind. 137; Hall *v.* Thayer, 12 Met. (Mass.) 130; Davis, etc., Co. *v.* Barber, 51 Fed. Rep. 148; Gibbons *v.* Bente, 51 Minn. 499, 53 N. W. R. 756, s. c. 22 L. R. A. 80, and note; but see Davis *v.* Shafer, 50 Fed. Rep. 764; Davis *v.* Bronson, 2 N. Dak. 300, s. c. 16 L. R. A. 655; Darnell *v.* Lyon, 85 Tex. 455; Galt *v.* Swain, 9 Gratt. (Va.) 633, s c. 60 Am. Dec. 311.

[2] Erie, etc., R. R. Co. *v.* Patrick, 2 Abb. App. Cas. 72, s. c. 2 Keyes (N. Y.) 256.

[3] Stimson's Am. Stat. (1892), §§ 8110, 8517.

[4] Illinois River R. Co. *v.* Zimmer, 20 Ill. 654; Pittsburgh, etc., R. Co. *v.* Applegate, 21 W. Va. 172; Minneapolis, etc., R. Co. *v.* Bassett, 20 Minn. 535, s. c. 18 Am. R. 376; Barrington *v.* Mississippi Cent. R. Co., 32 Miss. 370; Vicksburg, etc., R. Co. *v.* McKean, 12 La. Ann. 638; Wight *v.* Shelby R. Co., 16 B. Mon. (Ky.) 4; Mitchell *v.* Rome R. Co., 17 Ga. 574; Selma, etc., R. Co. *v.* Roundtree, 7 Ala. 670; Henry *v.* Vermillion, etc., R. Co., 17 Ohio 187; Spartanburg, etc., R. Co. *v.* Ezell, 14 S. C. 281; Webb *v.* Baltimore, etc., R. Co., 77 Md. 92; Oler *v.* Baltimore, etc., R. Co., 41 Md. 583; East Gloucestershire R. Co. *v.* Bartholomew, L. R. 3 Ex. 15.

[5] Haywood, etc., R. Co. *v.* Bryan, 6 Jones L. (N. C.) 82.

tion and that it may waive the right to avoid the subscription for this cause,[1] and enforce payment thereof, notwithstanding the fact that the statute, if literally construed, would seem to make a cash deposit essential to the validity of the subscription. In some of the states, however, this defense is allowed, because of the stringent language of the statute,[2] but even in such states it is strongly disapproved,[3] and is restricted to the narrowest possible limits.[4] Thus a few subscribers have been permitted to pay the percentage for all;[5] payment by check,[6] or by promissory note,[7] or in services rendered to the company under a contract,[8] has been held a sufficient compliance with the statute; and it has been held that actual payment at any

[1] Piscataqua Ferry Co. *v.* Jones, 39 N. H. 491; Lake Ontario, etc., R. Co. *v.* Mason, 16 N. Y. 451; Garrett *v.* Dillsburg, etc., R. Co., 78 Pa. St. 465. Cases cited in two preceding notes. But see McRea *v.* Russell, 12 Ired. (N. C.) 224, where it is said that the provision "was, moreover, meant to protect men from the consequences of making such subscriptions under the influence of momentary excitement, which they could not fulfill."

[2] Charlotte, etc., R. Co. *v.* Blakely, 3 Strobh. Eq. (S. C.) 245; People *v.* Chambers, 42 Cal. 201; Taggart *v.* Western Md. R. Co., 24 Md. 563; Wood *v.* Coosa, etc., R. Co., 32 Ga. 273; New York, etc., R. Co. *v.* Van Horn, 57 N. Y. 473; Hibernia T. Cor. *v.* Henderson, 8 Serg. & R. (Pa.) 219, s. c. 11 Am. Dec. 593; Fiser *v.* Mississippi, etc., R. R. Co., 32 Miss. 359. If the requirement is merely in the by-laws, and not in the charter or statute, failure to comply with it will not vitiate the subscription so as to prevent its enforcement by the company. Water Valley, etc., Co. *v.* Seaman, 53 Miss. 655; Piscataqua, etc., Co. *v.* Jones, 39 N. H. 491.

[3] Rensselaer, etc., R. Co. *v.* Barton, 16 N. Y. 457 note; Erie, etc., R. Co. *v.* Brown, 25 Pa. St. 156. In Wood *v.* Coosa, etc., R. Co., *supra*, the court based its decision upon the positive language of the statute that a subscription without a preliminary payment should be void.

[4] See note to Parker *v.* Thomas, 81 Am. Dec. 385, 397, 398.

[5] Ogdensburgh, etc., R. Co. *v.* Wooley, 3 Abb. Ct. of App. 398. See, also, Mississippi, etc., R. R. Co. *v.* Harris, 36 Miss. 17.

[6] Syracuse, etc., R. Co. *v.* Gere, 4 Hun (N. Y.) 392; *Re* Staten Isl., etc., R. Co., 37 Hun (N. Y.) 422, where the check was certified; People *v.* Stockton, etc., R. R. Co., 45 Cal. 306, s. c. 13 Am. R. 178, when it was shown that the check would have been paid if presented.

[7] Ogdensburgh, etc., R. Co. *v.* Wooley, 3 Abb. Ct. of App. 398; Vermont Cent. R. R. Co. *v.* Clayes, 21 Vt. 30, 35; Greenville, etc., R. R. Co. *v.* Woodsides, 5 Rich, L. (N. C.) 145, s. c. 55 Am. Dec. 708. *Contra* Boyd *v.* Peach Bottom R. Co., 90 Pa. St. 169; Leighty *v.* Susquehanna, etc., Co., 14 Serg. & R. (Pa.) 434.

[8] Beach *v.* Smith, 30 N. Y. 116, Aff'g same case, 28 Barb. 254.

period after subscription with intent to effectuate and complete the subscription is sufficient.[1] Indeed, acts indicating that the subscriber holds himself to be a shareholder may amount to a waiver of this defense.[2] And the statute is held to apply only to subscriptions expressly mentioned in it, and not to embrace conditional subscriptions,[3] nor subscriptions taken before incorporation,[4] where the language of the statute is general as to subscriptions given to the corporation. So, where the statute expressly referred only to subscriptions taken by the commissioners, the provision was held to apply to no others.[5]

§ 107. **Who may subscribe for stock.**—In general any one may subscribe for stock who is competent to enter into an ordinary contract.[6] Married women are enabled by statute in England[7] and generally in the United States,[8] to become subscribers for stock. An infant's subscription is subject to the same rules which apply to his other contracts.[9] And the general rules applicable to agency govern contracts made by the agents of the subscriber[10] or of the corporation,[11] or by persons assuming to act as such in case their acts are subsequently

[1] Black River, etc., R. Co. *v.* Clarke, 25 N. Y. 208; Barrington *v.* Mississippi Cent. R. R. Co., 32 Miss. 370.

[2] Erie, etc., R. Co. *v.* Brown, 25 Pa. St. 156; Everhart *v.* West Chester, etc., R. Co., 28 Pa. St. 339. See, also, Cole *v.* Satsop R. Co., 9 Wash. 487, s. c. 43 Am. St. R. 858, and note to the effect that it is no defense to subscribers as against creditors, that part of the necessary amount is illegally subscribed by others, if they knew the facts at the time they subscribed.

[3] Hanover, etc., R. Co. *v.* Haldeman, 82 Pa. St. 36.

[4] Garrett *v.* Dillsburg, etc., R. Co., 78 Pa. St. 465, construing Pennsylvania act of 1868.

[5] Philadelphia, etc., R. Co. *v.* Hickman, 28 Pa. St. 318.

[6] 1 Cook on Stock and Stockholders, § 63.

[7] Mrs. Matthewman's Case, L. R. 3 Eq. 781; Pugh & Sharman's Case, L. R. 13 Eq. 566.

[8] Stimson's Am. St. (1886), § 6450; Witter's *v.* Sowles, 32 Fed. R. 767.

[9] See Mitchell's Case, L. R. 9 Eq. 363; Ebbett's Case, L. R. 5 Chan. 302; Baker's Case, L. R. 7 Chan. 115; Dublin, etc., R. Co. *v.* Black, 8 Exch. 181.

[10] Musgrave *v.* Morrison, 54 Md. 161; *In re* New York, etc., Co., 35 Hun 220; *In re* New York, etc., R. Co., 99 N. Y. 12; Rhey *v.* Evensburgh, etc., 27 Pa. St. 261; Merrick, etc., Co. *v.* Philadelphia, etc., Co. (Pa.), 8 Atl. R. 794.

[11] Walker *v.* Mobile, etc., R. Co., 34 Miss. 245.

ratified.[1] The corporation itself can not make a valid subscription to its own stock,[2] and one corporation can not, as a general rule, subscribe for stock in another corporation[3] unless making such a subscription is within the powers, express or implied, conferred by its charter or by statute.[4] It has been held, however, that a construction company has implied power to take stock in a railroad which it is building.[5] Commissioners to take subscriptions[6] and corporate officers may take stock where the subscriptions are fairly made and no advantage is taken of the public or of other subscribers.[7] So municipal corporations are frequently given authority by the legislature to aid railroads by subscribing to their stock.[8]

§ 108. Presumption that one whose name is subscribed is a stockholder.—The appearance of a person's name on the books of a company as a subscriber or stockholder,[9] or its ap-

[1] Judah *v.* American, etc., Co., 4 Ind. 333; Musgrove *v.* Morrison, 54 Md. 161; Mississippi, etc., R. Co. *v.* Harris, 36 Miss. 17; Philadelphia, etc., R. Co. *v.* Cowell, 28 Pa. St. 329; Mobile, etc., R. Co. *v.* Yandal, 5 Sneed. (Tenn.) 294; 1 Cook on Stock and Stockholders, §§ 67, 68.

[2] Holladay *v.* Elliott, 8 Ore. 84; Allibone *v.* Hager, 46 Pa. St. 48; Preston *v.* Grand Colliery, etc., Co., 11 Sim. 327.

[3] Maunsell *v.* Midland Great W. R. Co., 1 Hem. & M. 130; Franklin Bank *v.* Commercial Bank, 36 Ohio St. 350, s. c. 38 Am. R. 594; Berry *v.* Yates, 24 Barb. (N. Y.) 199, 410; Zabriskie *v.* Railroad Co., 23 How. (U. S.) 381; Valley R. Co. *v.* Lake Erie Iron Co., 46 Ohio St. 44, s. c. 1 L. R. A. 412; People *v.* Chicago Gas Trust Co., 130 Ill. 268, s. c. 17 Am. St. R. 319; Merz Capsule Co. *v.* United States, etc., Co., 67 Fed. R. 414.

[4] White *v.* Syracuse, etc., R. Co., 14 Barb. N. Y. 559. See Mayor, etc., *v.* Baltimore, etc., R. Co., 21 Md. 50; Zabriskie *v.* Cleveland, etc., R. Co., 23 How. (U. S.) 381; Matthews *v.* Murchison, 17 Fed. R. 760; Ryan *v.* Leavenworth, etc., R. Co., 21 Kan. 365; Pearson *v.* Concord, etc., R. R. Co., 62 N. H. 537, s. c. 13 Am. St. R. 590, 13 Am. & Eng. R. R. Cas. 102.

[5] *In re* Rochester, etc., R. Co., 45 Hun 126.

[6] Walker *v.* Devereaux, 4 Paige 229.

[7] Sims *v.* Street R. Co., 37 Ohio St. 556. See Brower *v.* Passenger R. Co., 3 Phila. 161.

[8] Sharpless *v.* Mayor, 21 Pa. St. 147; *Ex parte* Selma, etc., R. R. Co., 45 Ala. 696, s. c. 6 Am. R. 722; Commissioners *v.* Miller, 7 Kan. 479, s. c. 12 Am. R. 425, where the authorities are collected and reviewed; 1 Thomp. Corp., § 1118. *Post*, § —. So, a state may subscribe. Curran *v.* Arkansas, 15 How. (U. S.) 304; Brady *v.* State, 26 Md. 290; Baltimore, etc., R. R. Co. *v.* State, 36 Md. 519.

[9] Pittsburgh, etc., R. Co. *v.* Applegate, 21 W. Va. 172; Turnbull *v.* Payson, 95 U. S. 418; Hoagland *v.* Bell, 36

pearance on the original subscription paper,[1] or books,[2] or its entry in the books kept by commissioners[3] to take subscriptions is said to be *prima facie* evidence that he is a stockholder.[4] But it is not conclusive unless shown to have been placed there by himself or by his authority.[5] Where the books are lost or destroyed, a certified copy of the list of stockholders from the files or records of a public office is held to be evidence in like manner as the books themselves, if such list is required by law to be so filed or recorded,[6] but not otherwise.[7] The erasure of a name from a subscription list by the subscriber will not necessarily end his liability,[8] but the fact that he became bound may be proved by parol, where the written evidences of that fact have been lost or destroyed.[9]

§ 109. **Implied promise to pay subscription — Consideration.**—An action by the corporation to recover the amount subscribed may be maintained upon the implied promise to pay contained in a subscription to its capital stock,[10] and the right to membership in the corporation, with the probable advantages

Barb. (N. Y.) 57; Iowa, etc., R. Co. *v.* Perkins, 28 Iowa 281.

[1] Partridge *v.* Badger, 25 Barb. (N. Y.) 146.

[2] Marlborough, etc., R. Co. *v.* Arnold, 9 Gray (Mass.) 159; Rockville, etc., Co. *v.* Van Ness, 2 Cranch C. C. (U. S.) 449.

[3] Wood *v.* Coosa, etc., R. Co., 32 Ga. 273.

[4] The presumption arising from his name being entered in the books may be overcome by proof. Mudgett *v.* Horrell, 33 Cal. 25.

[5] New Brunswick, etc., R. Co. *v.* Muggeridge, 4 H. & N. 160; Waterford, etc., R. Co. *v.* Pidcock, 8 Exchq. 279.

[6] Cleveland *v.* Lurnham, 55 Wis. 598.

[7] Troy, etc., R. Co. *v.* Kerr, 17 Barb. (N. Y.) 581, 600.

[8] Johnson *v.* Wabash, etc., Co., 16 Ind. 389; Greer *v.* Chartiers, etc., R. Co., 96 Pa. St. 391; Bordentown *v.* Imlay, 4 N. J. L. 285. But see Burt *v.* Farrar, 24 Barb. (N. Y.) 518, to the effect that a subscriber having access to the certificate before it is filed may erase or modify his subscription even though he has previously induced others to subscribe.

[9] Galveston Hotel Co. *v.* Bolton, 46 Tex. 633; Haynes *v.* Brown, 36 N. H. 545.

[10] Upton *v.* Tribilcock, 91 U. S. 45; Hawley *v.* Upton, 102 U. S. 314; Miller *v.* Wild Cat, etc., Co., 52 Ind. 51; Coppage *v.* Hutton, 124 Ind. 401; Windsor Electric Light Co. *v.* Tandy, 66 Vt. 248, 29 Atl. R. 248; Lake Ontario, etc., R. Co. *v.* Mason, 16 N. Y. 451; Chase *v.* East Tennessee, etc., R. Co., 5 Lea (Tenn.) 415; note to Parker *v.* Thomas, 81 Am. Dec. 385, 393, 394; Cook on Stock and Stockholders, § 71.

to be derived from such membership, is a sufficient consideration to support the action.[1] Indeed, a consideration arising from the mutual obligations entered into by the subscribers,[2] will, it seems, be conclusively implied by law from the fact of the subscription.[3] A subscription to the capital stock of a corporation amounts to an agreement to take the stock at its par value, and where a land-owner agrees to take the stock of a railroad company in payment of damages to his land caused by the construction of the road, he can not demand the stock at its market value.[4]

§ 110. Payment of subscription—Trust fund doctrine.—As already stated, a subscription to corporate stock is, in effect, a contract to pay for it in the mode prescribed, although it contains no express promise to pay.[5] The fund contributed and agreed to be contributed by the stockholders constitutes, in equity, a trust fund for the benefit or security of the corporate creditors,[6] and the general rule, therefore, is that subscriptions

[1] Bullock *v.* Falmouth, etc., Co., 85 Ky. 184, s. c. 3 S. W. R. 129; Selma, etc., R. R. Co. *v.* Tipton, 5 Ala. 787, s. c. 39 Am. Dec. 344; Walter A. Woods Harvester Co. *v.* Robbins, 56 Minn. 48, 57 N.W.R.317; New Albany, etc., R. R. Co. *v.* Fields, 10 Ind. 187; Osborn *v.* Crosby, 63 N. H. 583; Lake Ontario, etc., R. Co. *v.* Mason, 16 N. Y. 451; St. Paul, etc., R. R. Co. *v.* Robbins, 23 Minn. 439. In most of the New England States, however, it is held that the only remedy available to the corporation is to declare the shares forfeited, unless the subscriber expressly promises to pay, or the charter expressly provides that a subscription on his part shall bind him to pay for the shares subscribed. Belfast, etc., R. Co. *v.* Moore, 60 Me. 561; Connecticut, etc., R. Co. *v.* Bailey, 24 Vt. 465, s. c. 58 Am. Dec. 181; Boston, etc., R. Co. *v.* Wellington, 113 Mass. 79; White, etc., R. Co. *v.* Eastman, 34 N. H. 124; Russell *v.* Bristol, 49 Conn. 251.

[2] Northern, etc., R. R. Co. *v.* Miller, 10 Barb. (N. Y.) 260; Twin Creek, etc., Co. *v.* Lancaster, 79 Ky. 552; Belton Compress Co. *v.* Saunders, 70 Tex. 699, s. c. 6 S. W. R. 134; West *v.* Crawford, 80 Cal. 19, s. c. 21 Pac. R. 1123. But see Cottage, etc., Church *v.* Kendall, 121 Mass. 528, s. c. 23 Am. R. 286.

[3] East Tennessee, etc., R. Co. *v.* Gammon, 5 Sneed (Tenn.) 567.

[4] Hoffman *v.* Bloomsburg, etc., R. Co., 157 Pa. St. 174.

[5] *Ante*, § 109; 1 Morawetz Priv. Corp., § 128. Beach Priv. Corp., § 555; note to Winston *v.* Brooks, 4 L. R. A. 507.

[6] Adler *v.* Milwaukee, etc., Co., 13 Wis. 57; Wood *v.* Dummer, 3 Mason, (U. S.) 308; Sawyer *v.* Hoag, 17 Wall. (U. S.) 610; Upton *v.* Tribilcock, 91 U. S. 45; Germantown Pass. Ry. *v.* Fitler, 60 Pa. St. 124, s. c. 100 Am.

must be paid in money or "money's worth."[1] But this does not mean that stock must necessarily be paid for in cash at the time it is issued.[2] Unless otherwise provided, payment may be made in notes,[3] checks,[4] or municipal bonds,[5] where the municipality is authorized to issue them for that purpose. So, it may be made in labor or services.[6] And property which is

Dec. 546 and note; Graham *v.* Railroad Co., 102 U. S. 148, 161; Camden *v.* Steuart, 144 U. S. 104, s. c. 12 Sup. Ct. R. 585; 2 Thomp. Corp., § 1569; 2 Morawetz Priv. Corp., § 820, *et seq.* This doctrine, which is not found in the old English cases, is now too well settled in this country to need the citation of all the authorities. They are collected and reviewed in the note to Thompson *v.* Reno Sav. Bank, 3 Am. St. Rep. 797, 808, and in 1 Beach Priv. Corp., § 116 *et seq.* For explanations of the general doctrine and limitations upon another phase of it see Hollins *v.* Brierfield, etc., Co., 150 U.S. 371; Worthen *v.* Griffith, 59 Ark. 562, s. c. 43 Am. St. Rep. 50, and note; Henderson *v.* Indiana Trust Co., (Ind.) 40 N. E. Rep. 516; Chattanooga, etc., R. R. Co. *v.* Evans, 66 Fed. Rep. 809; First Nat. Bank *v.* Dovetail, etc., Co., (Ind.) 40 N. E. Rep. 810; O'Bear, etc., Co. *v.* Volfer, (Ala.) 17 So. Rep. 525.

[1] Drummond's case, L. R., 4 Ch. 772; Marshall Foundry Co. *v.* Killian, 99 N. Car. 501, s. c. 6 Am. St. Rep. 539; Wetherbee *v.* Baker, 35 N. J. Eq. 501; note to Winston *v.* Brooks, 4 L. R. A. 507.

[2] "Where a share is issued, if the price be paid in cash, so much is added to the working capital, thereby enhancing the creditor's security. If the price be not paid, the purchaser's indebtedness may be looked to for a like effect." Chouteau *v.* Dean, 7 Mo. App. 210, 214. "Unpaid stock is as much a part of this pledge (that the capital stock shall constitute a trust fund for the creditor), and as much a part of the assets of the company, as the cash which has been paid in upon it, creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due the company." Sanger *v.* Upton, 91 U. S. 56, 60, 61, and authorities there cited.

[3] Goodrich *v.* Reynolds, 31 Ill. 490, s. c. 83 Am. Dec. 240; Ogdensburg, etc., R. R. Co. *v.* Wooley, 3 Abb. App. Dec. (N. Y.) 398; Stoddard *v.* Shetucket, etc., Co., 34 Conn. 542; Vermont Cent. R. R. Co. *v.* Clayes, 21 Vt. 30; Hardy *v.* Merriweather, 14 Ind. 203; Blunt *v.* Walker, 11 Wis. 334, s. c. 78 Am. Dec. 709; Pacific Trust Co. *v.* Dorsey, 72 Cal. 55. And see Mitchell *v.* Beckman, 64 Cal. 117; Union Cent., etc., Co. *v.* Curtis, 35 Ohio St. 343; McDowell *v.* Chicago Steel Works, 124 Ill. 491.

[4] *In re* Staten Island, etc., R. R. Co., 37 Hun (N. Y.) 422; Syracuse, etc., R. R. Co. *v.* Gere, 4 Hun (N. Y.) 392; People *v.* Stockton, etc., R. R. Co., 45 Cal. 306, s. c. 13 Am. Rep. 178.

[5] See 2 Beach Priv. Corp., § 556; 15 Am. and Eng. Enc'y of Law, 1242, and authorites there cited. See, also, Southern, etc., Co. *v.* Lanier, 5 Fla. 110, s. c. 58 Am. Dec. 448; Valk *v.* Crandall, 1 Sandf. Ch. (N. Y.) 179; Leavitt *v.* Pell, 27 Barb. (N. Y.) 322.

[6] Cincinnati, Q. & C. R. R. Co. *v.* Clarkson, 7 Ind. 595; Liebke *v.* Knapp, 79 Mo. 22, s. c. 49 Am. Rep.

necessary to the corporation in carrying out its legitimate business, or which it is authorized to purchase, may likewise be received in payment.[1] It has also been held that stock may be issued in satisfaction of a debt due from the corporation.[2] But the transaction must be *bona fide*, and the overvaluation of services or property received in payment may be so grossly excessive as to raise a presumption of fraud.[3] Yet the courts will usually treat that as a payment which the parties have agreed shall be payment,[4] and it will make no difference, in the absence of fraud, that the property afterwards turns out to be of less value than was supposed.[5] The doctrine which we have been

212; Beach *v.* Smith, 30 N. Y. 116; Rich *v.* State Nat. Bank, 7 Neb. 201, s. c. 29 Am. Rep. 382; State *v.* Timken, 48 N. J. L. 87, s. c. 2 Atl. Rep. 783; and note in 19 Am. and Eng. Corp. Cas. 258. Upon principle, where the corporation has authority to pay its officers salaries or compensation for special services, there seems to be no valid reason why the indebtedness of the corporation to them may not be used to pay for stock issued to him in good faith. 2 Thomp. Corp., § 1652. But see *Ex parte* Daniell, 1 De G. and J. 372.

[1] Coffin *v.* Ransdall, 110 Ind. 417; Ohio, etc., R. R. Co. *v.* Cramer, 23 Ind. 490; New Haven Nail Co. *v.* Linden Spring Co., 142 Mass. 349; Philadelphia, etc., R. R. Co. *v.* Hickman, 28 Pa. St. 318; Liebke *v.* Knapp, 79 Mo. 22, s. c. 49 Am. R. 212; Clark *v.* Farrington, 11 Wis. 306; Beach *v.* Smith, 30 N. Y. 116; Frenkel *v.* Hudson, 82 Ala. 158, s. c. 60 Am. R. 736; Bedford County *v.* Nashville, etc., R. R. Co., 14 Lea (Tenn.) 525; Branch *v.* Jesup, 106 U. S. 468, s. c. 1 Sup. Ct. R. 495. *Contra*, Henry *v.* Vermilion, etc., R. R. Co., 17 Ohio 187; Neuse, etc., Co. *v.* Commissioners, 6 Jones (N. Car. L.) 204.

[2] Lohman *v.* New York, etc., R. R. Co., 2 Sandf. (N. Y.) 39; Reed *v.* Hayt, 51 N. Y. Super. Ct. R. 121; Carr *v.* LeFevre, 27 Pa. St. 413; Appleyard's Case, 49 L. J. Ch. 290; Woodfall's Case, 3 DeG. & Sm. 63. So, it has been held that it may be issued in payment of damages. Philadelphia, etc., R. R. Co. *v.* Hickman, 28 Pa. St. 318.

[3] Douglass *v.* Ireland, 73 N. Y. 100; Boynton *v.* Andrews, 63 N. Y. 93; Carr *v.* LeFevre, 27 Pa. St. 413; Elyton Land Co. *v.* Birmingham, etc., 92 Ala. 407, 9 So. R. 129; Boulton, etc., Co. *v.* Mills, 78 Iowa 460, s. c. 6 Ry. & Corp. L. J. 417. See, also, National Tube Works Co. *v.* Gilfillan, 124 N. Y. 302; Chisholm *v.* Forny, 65 Iowa 333; Osgood *v.* King, 42 Iowa 478. And in a few states the property must be taken at its true value in order to amount to a complete payment as against a creditor. Libby *v.* Tobey, 82 Me. 397, s. c. 19 Atl. R. 904; Shickle *v.* Watts, 94 Mo. 410, 2 Thomp. Corp., § 1616.

[4] Phelan *v.* Hazard, 5 Dill. (U. S.) 45, s. c. 6 Cent. L. J. 109; Coffin *v.* Ransdell, 110 Ind. 417; Brant *v.* Ehlen, 59 Md. 1; Peck *v.* Coalfield Coal Co., 11 Ill App. 88.

[5] Coit *v.* North Carolina, etc., Co., 14 Fed. R. 12, affirmed in 119 U. S. 343, s. c. 7 Sup. Ct. R. 231; Young *v.*

considering would seem to prevent a corporation, at least as against creditors, from issuing paid-up stock and releasing the subscriber upon payment in money of less than its par value;[1] but where all the other stockholders consent, and it is not forbidden by the charter or statute, such a transaction is binding upon the company, and it can not collect the difference between the amount paid and the face value of the stock for its own benefit.[2] And in a recent case, the Supreme Court of the United States went still further and held that an active corporation might issue stock and sell it upon the market for far less than its par value, in order to obtain money to prosecute its business and pay its debts, and that creditors could not compel the purchaser to pay its face value.[3] This case, however, has met with much criticism,[4] and the rule therein announced should not be extended in its application to a different state of facts.

§ 111. **Conditional subscriptions.**—A subscription may be made upon a condition precedent, in which case it can only be enforced after the performance of the condition.[5] The courts,

Erie, etc., R. R. Co., 65 Mich. 111; Arapahoe, etc., Co. *v.* Stevens, 13 Colo. 534, 22 Pac. R. 823; Coe *v.* East & West R. R. Co., 52 Fed. R. 531; Grant *v.* East & West R. R. Co., 54 Fed. R. 569; Schenck *v.* Andrews, 57 N. Y. 133; DuPont *v.* Tilden, 42 Fed. R. 87; Brickley *v.* Schlag, 46 N. J. Eq. 533, 20 Atl. 250.

[1] See Chouteau *v.* Dean, 7 Mo. App. 210; Williams *v.* Evans, 87 Ala. 725, s. c. 6 So. R. 702; Upton *v.* Tribilcock, 91 U. S. 45; Sawyer *v.* Hoag, 17 Wall. (U. S.) 610; Bates *v.* Great Western Tel. Co., 134 Ill. 536, s. c. 25 N. E. R. 521; Gogebic, etc., Co. *v.* Iron Chief, etc., Co., 78 Wis. 427, s. c. 47 N. W. R. 726; Taylor on Corp., § 702; 2 Beach Priv. Corp., §§ 561, 562.

[2] Scovill *v.* Thayer, 105 U. S. 143; Harrison *v.* Arkansas Valley Ry. Co., 4 McCrary (U. S.) 264. See, also, Higgins *v.* Lansingh, 154 Ill. 301, 40 N. E. R. 362; Foster *v.* Seymour, 23 Fed. R. 65; Stewart *v.* Railroad Co., 41 Fed. R. 736; St. Louis, etc., R. R. Co. *v.* Tiernan, 37 Kan. 606, s. c. 15 Pac. R. 544.

[3] Handley *v.* Stutz, 139 U. S. 417, s. c. 11 Sup. Ct. R. 530. See, also, cases cited in Grant *v.* East & West R. R. Co., 54 Fed. R. 569, 575, and Van Cott *v.* Van Brunt, 82 N. Y. 535.

[4] See article by R. C. McMurtrie in 25 Am. L. Rev. 749; 2 Thomp. Corp., § 1665.

[5] Taggart *v.* Western Md. R. Co., 24 Md. 563; Lowe *v.* Edgefield, etc., R. Co., 1 Head (Tenn.) 659; Ashtabula, etc., R. Co. *v.* Smith, 15 Ohio St. 328; Porter *v.* Raymond, 53 N. H. 519; Montpelier, etc., R. Co. *v.* Langdon, 46 Vt. 284; Bucksport, etc., R. Co. *v.* Buck,

however, lean toward a construction of the subscription which will hold any conditions expressed therein to be conditions subsequent,[1] in which case the subscription is held to be absolute,[2] and the condition subsequent a separate contract on the part of the corporation to be enforced like other contracts.[3] Subscriptions made before incorporation and taken for the purpose of raising the capital required to secure incorporation under a general statute, must be absolute.[4] Advance subscriptions made upon condition are held void in New York,[5] while the condition only is held void in Pennsylvania,[6] and the subscription is upheld as an absolute one. But the cases generally agree that a conditional subscription is not to be

68 Me. 81; Peoria, etc., R. Co. *v.* Preston, 35 Iowa 115; Chartiers, etc., R. *v.* Hodgens, 85 Pa. St. 501; Milwaukee, etc., R. Co. *v.* Field. 12 Wis 340; Allman *v.* Havana, etc., R. Co., 88 Ill. 521; Monroe *v.* Fort Wayne, etc., R. Co., 28 Mich. 272; North, etc., R. Co. *v.* Winfree, 51 Ga. 318; note to Parker *v.* Thomas, 81 Am. Dec. 385, 398.

[1] Swartwout *v.* Michigan Air Line R. Co., 24 Mich. 389; Chamberlain *v.* Painesville, etc., R. Co., 15 Ohio St. 225. The electors of a county voted to subscribe for stock in the plaintiff's railroad and issue the bonds of the county for the same, on condition that the railroad should be completed and in operation in the county, by lease or otherwise, from a connection with existing roads in the state, and, also, conditioned that the acceptance of the bonds issued in payment of the stock should constitute a covenant binding upon the railroad company, its lessees or assigns, to maintain and operate said line of road, by lease or otherwise, over its route for a term of 99 years. The court held that an agreement by the railroad company, executed after such subscription, to sell and transfer its road after it was completed, in order to obtain money for its construction, did not discharge or release the county from the payment of its subscription. Southern Kan. & P. R. Co. *v.* Tower, 41 Kan. 72.

[2] Belfast, etc., R. Co. *v.* Moore, 60 Me. 561, 576; Henderson, etc., R. R. Co. *v.* Leavell, 16 B. Mon. (Ky.) 358; Paducah, etc., R. Co. *v.* Parks, 86 Tenn. 554; Miller *v.* Pittsburgh, etc., R. Co., 40 Pa. St. 237; Johnson *v.* Georgia, etc., R. Co., 81 Ga. 725.

[3] 1 Cook on Stock and Stockholders, § 78.

[4] Boyd *v.* Peach Bottom R. Co., 90 Pa. St. 169, s. c. 1 Am. & Eng. R. R. Cas. 631; Troy, etc., R. Co. *v.* Newton, 8 Gray (Mass.) 596; Chamberlin *v.* Painesville, etc., R. R. Co., 15 Ohio St. 225; Brand *v.* Lawrenceville, etc., R. Co., 77 Ga. 506, 1 S. E. 255; New York, etc., R. Co. *v.* Hunt, 39 Conn. 75; Troy, etc., R. Co. *v.* Tibbits, 18 Barb. (N. Y.) 297; Ellison *v.* Mobile, etc., R. Co., 36 Miss. 572.

[5] Troy, etc., R. Co. *v.* Tibbits, 18 Barb. (N. Y.) 297.

[6] Boyd *v.* Peach Bottom R. Co., 90 Pa. St. 169; Caley *v.* Philadelphia, etc., R. R. Co., 80 Pa. St. 363. See, also, Burke *v.* Smith, 16 Wall. (U. S.) 390, 396.

counted in estimating the stock subscribed,[1] and the better reason and weight of authority would seem to be that, when made for this purpose, only absolute subscriptions are valid and enforceable by either the subscriber or the corporation.[2] Yet, a condition in a preliminary subscription that the organization shall not be completed until a certain amount of stock has been subscribed, is valid.[3] And such a provision in the charter constitutes a condition precedent annexed to every subscription.[4]

[1] Caley *v.* Philadelphia, etc., R. R. Co., 80 Pa. St. 363; California, etc., Co. *v.* Russell, 88 Cal. 277; New York, etc., R. R. Co. *v.* Hunt, 39 Conn. 75; Boston, etc., R. R. Co. *v.* Wellington, 113 Mass. 79; Brand *v.* Lawrenceville, etc., R. R. Co., 77 Ga. 506. Nor colorable or fictitious subscriptions. Memphis Branch R. R. Co. *v.* Sullivan, 57 Ga. 240. Nor subscriptions by persons having no reasonable expectation of being able to pay. Holman *v.* State, 105 Ind. 569; Belfast, etc., R. R. Co. *v.* Inhabitants of Brooks, 60 Me. 568.

[2] 1 Cook on Stock and Stockholders, § 79, note.

[3] Penobscot, etc., R. Co. *v.* Dunn, 39 Me. 587; Philadelphia, etc., R. Co. *v.* Hickman, 28 Pa. St. 318. And, according to the weight of authority, there is even at common law, an implied condition that all the required stock shall be subscribed before a subscription shall become due. Anderson *v.* Middle & East Tenn. Cent. R. R. Co., 91 Tenn. 44, 52 Am. & Eng. R. R. Cas. 149, 151; Denny Hotel Co. *v.* Schram, 6 Wash. 134, s. c. 32 Pac. R. 1002; Salem Mill Dam Corp. *v.* Ropes, 6 Pick. (Mass.) 23; Livesey *v.* Omaha Hotel Co., 5 Neb. 50, and authorities there cited; Peoria, etc., R. R. Co. *v.* Preston, 35 Iowa 115; New Hampshire Cent. R. R. Co. *v.* Johnson, 30 N. H. 390, s. c. 64 Am. Dec. 300, 23 Am. & Eng. Ency. of Law 840, and authorities cited in note. But see Astoria, etc., R. R. Co. *v.* Hill, 20 Ore. 177; Newcastle, etc., R. R. Co. *v.* Bell, 8 Blackf. (Ind.) 584; Chubb *v.* Upton, 95 U. S. 665; Cheraw, etc., R. R. Co. *v.* White, 14 S. Car. 51; Stewart *v.* Minnesota, etc., R. R. Co., 36 Minn. 355 (as to rights of creditors). See, also, *ante*, § 18.

[4] Memphis Branch R. Co. *v.* Sullivan, 57 Ga. 240; Peoria, etc., R. Co. *v.* Preston, 35 Iowa 115; New Hampshire, etc., R. Co. *v.* Johnson, 30 N. H. 390; Somerset R. Co. *v.* Clarke, 61 Me. 379. Subscribers for stock of an incorporated company, whose capital is fixed at a certain sum, whose shares are limited to a certain number, and whose charter provides that payment shall be made as may be determined by the board of directors, can not be compelled to pay until the whole capital has been subscribed for and the board has called for payment, unless it is shown that by their acts they have waived their rights in those regards. Exposition R., etc., Co. *v.* Canal St. E. R. Co., 42 La. Ann. 370. This is the common law rule where the charter does not otherwise provide, but such defense may be waived by the subscriber. Masonic Temple Ass'n *v.* Channell, 43 Minn. 353; International, etc., Ass'n *v.* Walker, 83 Mich. 386, 3 Lewis' Am. R. R. & Corp. R. 731.

§ 112. **Valid and invalid conditions.**—Where the condition is that the capital stock shall be limited to a certain amount, a subscription in excess thereof can not be enforced by the corporation.[1] Parol conditions annexed to an absolute subscription are held void as a fraud upon the corporate creditors and other subscribers who are injured thereby,[2] and the subscription is enforceable according to its terms. It can not even be varied by a separate written contract executed at the time the subscription was made, if such separate contract was unknown to other subscribers and creditors.[3] But any condition which can be legally[4] performed or complied with by the corporation,[5] may be annexed to a subscription given for stock in a corporation which is already organized, if such condition be expressed

47 N. W. R. 338. Such a condition is waived if the subscriber, with knowledge that the required proportion of the stock has not been subscribed attends the meetings of the company and participates in its organization, but not if he acted in ignorance of the fact that the required stock had not been subscribed. Fairview, etc., R. Co. *v.* Spillman, 23 Ore. 587; Auburn Opera House, etc., *v.* Hill (Cal.), 32 Pac. R. 587; International, etc., Ass'n *v.* Walker, 97 Mich. 159.

[1] Burrows *v.* Smith, 10 N. Y. 550; Oler *v.* Baltimore, etc., R. R. Co., 41 Md. 583; Clark *v.* Turner, 73 Ga. 1; Merrill *v.* Gamble, 46 Iowa 615. See, also, Laredo Imp. Co. *v.* Stevenson, 66 Fed. R. 633.

[2] New Albany, etc., R. Co. *v.* Fields, 10 Ind. 187; Kishacoquillas, etc., T. R. Co. *v.* McConaby, 16 Serg. & R. (Pa.) 140; Robinson *v.* Pittsburg, etc., R. Co. 32 Pa. St. 334; Connecticut, etc., R. Co. *v.* Bailey, 24 Vt. 465; Preston *v.* Grand Collier Dock Co., 2 Eng. Rail & Canal Cas. 335; Davidson's Case, 3 De G. & S. 21; Mann *v.* Cooke, 20 Conn. 178; Chouteau Co. *v.* Floyd, 74 Mo. 286; Mississippi, etc., R. R. Co. *v.* Cross, 20 Ark. 443.

[3] Brownlee *v.* Ohio, etc., R. Co., 18 Ind. 68; White Mountains R. Co. *v.* Eastman, 34 N. H. 124; Meyer *v.* Blair, 109 N. Y. 600, s. c. 4 Am. St. R. 500.

[4] As to the effect of an *ultra vires* condition in a subscription, see, Pellatt's Case, L. R. 2 Ch. 527; Thigpen *v.* Mississippi, etc., R. Co., 32 Miss. 347. See, also, Morrow *v.* Nashville, etc., Co., 87 Tenn. 262, 3 L. R. A. 37; Laredo Imp. Co. *v.* Stevenson, 66 Fed. R. 633.

[5] Penobscot, etc., R. Co. *v.* Dunn, 39 Me. 587; Louisville, etc., R. Co. *v.* Sumner, 106 Ind. 55, 60; Ashtabula, etc., R. Co. *v.* Smith, 15 Ohio St. 328; McMillan *v.* Maysville, etc., R. Co., 15 B. Monroe (Ky.) 218; Dayton, etc., R. Co. *v.* Hatch, 1 Disney (Cin. Super. Ct.) 84; Lake Ontario Shore R. Co. *v.* Curtiss, 80 N. Y. 219. See Chicago, etc., R. Co. *v.* Aurora, 99 Ill. 205, where it is held that a town may issue railroad aid bonds, payable upon a condition which can not legally be fulfilled.

therein.[1] A condition will be presumed to have been made when the subscription was given, in the absence of proof,[2] and will be held valid when annexed to the subscription after it was given, if done with the consent of all the parties, and for a consideration.[3]

§ 113. Conditional subscription is a mere offer until accepted.—A conditional subscription usually constitutes only an offer on the part of the subscriber until it is accepted by the corporation,[4] after which, upon performance of the condition, it has the binding force of any other subscription,[5] but it has been held that such a subscription may be recalled if there is an unreasonable delay in accepting it.[6] So, a gratuitous subscription with only one signer is said to be an offer, which, until accepted by the promisee in express terms, or by a per-

[1] For conditions which have been held valid see 1 Cook on Stock and Stockholders, § 83; 23 Am. & Eng. Ency. of Law, 836, 837.

[2] Robinson *v.* Pittsburg, etc., R. Co., 32 Pa. St. 334.

[3] Pittsburg, etc., R. Co. *v.* Stewart, 41 Pa. St. 54; New Hampshire Cent. R. Co. *v.* Johnson, 30 N. H. 390; Tonica, etc., R. Co. *v.* Stein, 21 Ill. 96.

[4] Junction R. Co. *v.* Reeve, 15 Ind. 236. See, also, Cass *v.* Pittsburg, etc., R. Co., 80 Pa. St. 31; Taggart *v.* Western Md. R. Co., 24 Md. 563, s. c. 89 Am. Dec. 760. But see Mansfield, etc., R. Co. *v.* Stout, 26 Ohio St. 241, to the effect that the question of acceptance is immaterial where the corporation has fully performed the condition imposed. The death of the subscriber before acceptance of a conditional subscription amounts to a revocation. Wallace *v.* Townsend, 43 Ohio St. 537; Sedalia, etc., Ry. Co. *v.* Wilkinson, 83 Mo. 235. Where the acceptance must be formal, as in an offer to give land in payment for stock, it must be by the board of directors, or a specially authorized agent, so as to bind the company to issue stock in exchange for it before the subscriber will be bound. An acceptance by less than a quorum of the directors will not bind him. Junction R. Co. *v.* Reeve, 15 Ind. 236.

[5] New Albany, etc., R. Co. *v.* McCormick, 10 Ind. 499; Ashtabula, etc., R. Co. *v.* Smith, 15 Ohio St. 328; Armstrong *v.* Karshner, 47 Ohio St. 276, s. c. 24 N. E. Rep. 897; Webb *v.* Baltimore, etc., R. Co., 77 Md. 92, 54 Am. & Eng. R. Cas. 202. Immediately upon performance of the condition, a promise on the part of the subscriber to pay, and of the company to issue its stock upon such payment, is implied. Mansfield, etc., R. Co. *v.* Brown, 26 Ohio St. 223; St. Paul, etc., R. Co. *v.* Robbins, 23 Minn. 439.

[6] Taggart *v.* Western Md. R. Co., 24 Md. 563. See, also, Wood's Case, L. R. 15 Eq. 236, holding that notice of such recall may be given to the secretary. That a conditional subscription may be revoked while still in the hands of the corporate agent, see Lowe *v.* Edgefield, etc., R. Co., 1 Head (Tenn.) 659.

formance of the conditions stipulated therein, is but a *nudum pactum*, and can not be enforced, against the will of the subscriber, by an action at law.[1]

§ 114. **Subscriptions in escrow—Parol evidence.**—A contract of subscription to capital stock, absolute on its face, may, like any other contract, be delivered to a third person to be held in *escrow* until the performance of certain conditions. But if delivered to the railroad company it becomes valid and binding, and the delivery is effectual to convey title to the company.[2] Where a subscription is delivered in *escrow*, parol evidence is admissible to show the conditions upon which it is held.[3] But such evidence is not, as a rule, admissible to establish an *escrow* in the hands of the company,[4] although it has been held admissible to show that a subscription left with a soliciting agent was not to be delivered until the subscriber should have made an investigation and directed its delivery, and that, upon the investigation proving unsatisfactory, he had at once notified the agent to withhold and cancel it.[5] If a subscription, delivered to a committee of citizens to be held as an *escrow* to await the performance of certain parol conditions annexed thereto, be delivered to the company before the condition is fulfilled, such delivery is ineffective, and the sub-

[1] Broadbent *v.* Johnson, 2 Idaho 300, 13 Pac. Rep. 83.

[2] Cass *v.* Pittsburg, etc., R. Co., 80 Pa. St. 31; Wight *v.* Shelby R. Co., 16 B. Mon. (Ky.) 4, s. c. 63 Am. Dec. 522, where delivery was made to a commissioner to take subscriptions. But a director not authorized to take subscriptions directly may hold one in *escrow*. Ottawa, etc., R. Co. *v.* Hall, 1 Bradw. (Ill.) 612. And it has been held that where the subscription was left in the hands of an agent to solicit subscription with directions, to which he assented, to hold it until the subscriber made investigations and not to deliver it to the company until the subscriber directed him to do so, and the subscriber, on the investigation proving unsatisfactory, immediately notified the agent to withhold and cancel it, the subscriber did not become a stockholder and was not liable thereon. Great Western Tel. Co. *v.* Loewenthal, 154 Ill. 261, 40 N. E. R. 318.

[3] Ottawa, etc., R. Co. *v.* Hall, 1 Bradw. (Ill.) 612; Great Western Tel. Co. *v.* Loewenthal, 154 Ill. 261, 40 N. E. R. 318.

[4] Wight *v.* Shelby R. Co., 16 B. Mon. (Ky.) 4.

[5] Great Western Tel. Co. *v.* Loewenthal, 154 Ill. 261, 40 N. E. R. 318. See, also, Cass *v.* Pittsburg, etc., R. R. Co., 80 Pa. St. 31.

scription can not be enforced.[1] When a subscription is given on a separate paper, parol evidence is admissible to show that it was to be annexed to the books only on the performance of certain conditions.[2] So, on the other hand, it has been held that where a subscription is in the name of a party as "trustee" it may be shown by parol evidence that he acted as agent for others, and creditors, or a receiver appointed at their instance, may maintain an action to recover the subscription from the real parties in interest.[3]

§ 115. **Waiver of conditions.**—The condition may be waived by the subscriber, by express agreement,[4] by acting as an officer of the corporation,[5] by paying the whole subscription,[6] or giving an absolute, promissory note therefor,[7] or by any act

[1] Beloit, etc., R. Co. *v.* Palmer, 19 Wis. 574. The same is true if it be put into the hands of a special agent of the company to be delivered only upon the performance of conditions annexed. Saginaw, etc., R. Co. *v.* Chappell, 56 Mich. 190.

[2] Bucher *v.* Dillsburg, etc., R. Co., 76 Pa. St. 306; Tonica, etc., R. Co. *v.* Stein, 21 Ill. 95.

[3] Cole *v.* Satsop R. Co., 9 Wash. 487, s. c. 43 Am. St. R. 858. But see as to the inadmissibility of parol evidence generally, Smith *v.* Tallahassee, etc., Co., 30 Ala. 650; Martin *v.* Pensacola, etc., R. Co., 8 Fla. 370, s. c. 73 Am. Dec. 713; New Albany, etc., R. Co. *v.* Fields, 10 Ind. 187; Wight *v.* Shelby R. Co., 16 B. Mon. (Ky.) 4, s. c. 63 Am. Dec. 522; Kennebec, etc., R. Co. *v.* Waters, 34 Me. 369; Miller *v.* Hanover, etc., R. Co., 87 Pa. St. 95, s. c. 30 Am. R. 349.

[4] Hanover Junction, etc., R. Co. *v.* Haldeman, 82 Pa. St. 36. The condition implied by law in subscriptions to stock, that payment shall not be enforced until all the stock is subscribed is waived by the subscribers to the stock of a railroad company expressly agreeing, for the purpose of enabling the company to build a certain part of its road, to pay their subscriptions; and if the company acts upon this agreement and constructs the road, the subscribers making such an agreement must pay, though others do not. Anderson *v.* Middle, etc., Tenn. Cent. R. Co., 91 Tenn. 44, 52 Am. & Eng. R. Cas. 149. As to waiver of such condition by express agreement, see, also, Skowhegan, etc., R. Co. *v.* Kinsman, 77 Me. 370.

[5] Dayton, etc., R. Co. *v.* Hatch, 1 Disney (Cin. Super. Ct.) 84; Lane *v.* Brainerd, 30 Conn. 565.

[6] Parks *v.* Evansville, etc., R. Co., 23 Ind. 567.

[7] Evansville, etc., R. Co. *v.* Dunn, 17 Ind. 603; Slipher *v.* Earhart, 83 Ind. 173; Chamberlain *v.* Painesville, etc., R. Co., 15 Ohio St. 225. But when the company's agent induces the subscriber to execute the notes by means of falsely representing that the condition has been complied with, their execution is not a waiver. Taylor *v.* Fletcher, 15 Ind. 80. See, also, Parker *v.* Thomas, 19 Ind. 213. And where payments are made under a

which shows an intention to hold himself to be an absolute shareholder in the enterprise.[1] So, as a general rule, any acts on the part of the subscriber which have induced others to act in reliance upon the fact that he was a stockholder will be sufficient to establish such a waiver without any necessity for showing that either the corporation or any other subscriber has in fact been influenced by such acts.[2] The rule as to waiver of the implied condition that no subscription shall be payable until all of the capital stock has been subscribed is well stated in a recent case, as follows: "The courts, in stating what will estop the subscriber, or prevent his being heard to make the objection (that the full capital stock of the corporation has not been subscribed) refer only to his acts, and do not include the fact that they did influence others. If a technical estoppel were required to prevent a subscriber withdrawing his subscription on this ground much fraud might be committed; for, if it must be shown that the corporation or some subscriber, of whom there may be many hundreds or even thousands, was in fact influenced by the acts of the subscriber who seeks to withdraw, it might be impossible to prove the fact, even though it exist. The safer rule in such a case is that, if his acts are of such a character that either the corporation or subscribers may have been induced by them to act, and will be prejudiced if he be permitted to withdraw, he shall be held to have waived, or to be estopped to assert the defense. It is immaterial which word is used, except, perhaps, for the

mistaken belief induced by false and fraudulent representations that the condition has previously been performed, such payment is not a waiver. Ridgefield, etc., R. Co. *v.* Brush, 43 Conn. 86; Somerset, etc., R. Co. *v.* Cushing, 45 Me. 524; Morris, etc., Co. *v.* Nathan, 2 Hall (N. Y.) 239. The note given subsequent to the contract of subscription can not be regarded as forming a part of such contract and so is not subject to the conditions annexed to it. O'Donald *v.* Evansville, etc., R. Co., 14 Ind. 259.

[1] Parks *v.* Evansville, etc., R. Co., 23 Ind. 567; Parker *v.* Thomas, 19 Ind. 213; Willamette Freighting Co. *v.* Stannus, 4 Ore. 261. Delay in cancelling a subscription may bind one where it shows an intention to become an absolute stockholder. Wheatcroft's Case, 29 L. T. R. 324.

[2] Railway Co. *v.* Lacey, 3 Younge & J. 80.

sake of strict verbal accuracy.'"[1] A waiver will generally be implied if the subscriber consents to the letting of contracts, the creation of debt, or the doing of any corporate act involving the necessity of calling in the subscribed stock, unless the charter expressly forbid the doing of any corporate act until the requisite capital is subscribed.[2] An express condition may also be waived or qualified by another clause of the agreement which is inconsistent with it.[3] But a subscriber's mere silence,[4] or a part payment,[5] or soliciting subscriptions and permitting himself to be chosen to a corporate office, without acting as such,[6] is not necessarily such a waiver. Nor, in general, is participation in any acts done for perfecting the organization and setting it on its feet for business, such as preparing and procuring the execution of the articles, procuring subscriptions to its stock, preparing by-laws for its government, and the like, to be considered a waiver of the condition that the corporation shall not begin business until the capital stock is all subscribed, for these things are proper, and to some extent necessary to be done, although the subscriptions are incomplete.[7] If the annexed condition be a reserved right to withdraw the subscription, this right must be exercised within a reasonable time or it will be held to be waived.[8]

§ 116. When conditional subscription becomes payable.— Where certain acts are to be done within a specified time, the

[1] Masonic Temple Ass'n *v.* Channell, 43 Minn. 353.

[2] Anderson *v.* Middle, etc., Tenn. Cent. R. Co., 91 Tenn. 44, 52 Am. & Eng. R. Cas. 149.

[3] Woonsocket Union R. Co. *v.* Sherman, 8 R. I. 564.

[4] Burlington, etc., R. Co. *v.* Boestler, 15 Iowa 555; Bucksport, etc., R. Co. *v.* Inhabitants, etc., 67 Me. 295.

[5] Jewett *v.* Lawrenceburgh, etc., R. Co., 10 Ind. 539; Pittsburgh, etc., R. Co. *v.* Stewart, 41 Pa. St. 54. But see Klein *v.* Alton, etc., R. R. Co., 13 Ill. 514. The distinction is made as to whether the payments are such as to entitle the subscriber to demand his stock and preclude the company from denying that he is a stockholder. Appeal of Mack, (Pa.) 7 Atl. R. 481. See, also, Parks *v.* Evansville, etc., R. Co., 23 Ind. 567.

[6] Ridgefield, etc., R. Co. *v.* Reynolds, 46 Conn. 375.

[7] Gillfillan, C. J., in Masonic Temple Ass'n *v.* Channell, 43 Minn. 353; Oldtown, etc., R. R. Co. *v.* Veazie, 39 Me. 571; Memphis, etc., R. R. Co. *v.* Sullivan, 57 Ga. 240.

[8] Wilmington, etc., R. Co. *v.* Robeson, 5 Ired. (N. C.) 391.

expiration of the time without performance will generally operate to discharge the subscriber from liability,[1] at least where they are conditions precedent and time is of the essence. A subscription made on condition that the road shall be "permanently" located on a certain route becomes payable when that route is adopted by the directors,[2] but a change in the route so that it does not fulfill the conditions, after part of the money is paid, may enable the subscriber to recover his money.[3] Whether the conditions have been performed is a question of fact which may be proved by parol,[4] as may fraud or bad faith on the part of the corporation or its officers in this connection.[5] Where the agreement leaves the question as to when the condition has been performed to the judgment of the directors, their decision, if made in good faith, is final.[6] Notice of such performance must usually be given to the subscriber, and payment demanded before the subscription will become payable.[7] But a formal notice of performance is not necessary before suit, where the subscriber has actual knowledge that the condition has been fulfilled.[8] Property subscribed in payment

[1] Freeman *v.* Matlock, 67 Ind. 99; Moore *v.* Campbell, 111 Ind. 328; Memphis, etc., R. Co. *v.* Thompson, 24 Kan. 170; Portland, etc., R. Co. *v.* Inhabitants, etc., 58 Me. 23. Where performance of the condition was completed soon after the expiration of the time, and the subscriber neglected to take his name off the books, he was held bound. Lee *v.* Imbrie, 11 Pac. R. 270, 13 Ore. 510. And see Missouri Pac. R. Co. *v.* Tygard, 84 Mo. 263. See, however, Freeman *v.* Matlock, 68 Ind. 99.

[2] Smith *v.* Allison, 23 Ind. 366.

[3] Jewett *v.* Lawrenceburgh, etc., R. Co., 10 Ind. 539.

[4] St. Louis, etc., R. Co. *v.* Eakins, 30 Iowa 279; Jewett *v.* Lawrenceburgh, etc., R. Co., 10 Ind. 539. See, also, Toledo, etc., R. R. Co. *v.* Johnson, 49 Mich. 148. In some cases proof is made by the corporate records. Penobscot, etc., R. Co. *v.* Dunn, 39 Me. 587. And the burden is usually upon the company. Santa Cruz R. R. Co. *v.* Schwartz, 53 Cal. 106; Bucksport, etc., R. R. Co. *v.* Buck, 65 Me. 536; Chase *v.* Sycamore, etc., R. R. Co., 38 Ill. 215.

[5] New York Ex. Co. *v.* De Wolf, 31 N. Y. 273.

[6] Cass *v.* Pittsburgh, etc., R. Co., 80 Pa. St. 31.

[7] Chase *v.* Sycamore, etc., R. Co., 38 Ill. 215; Trott *v.* Sarchett, 10 Ohio St. 241; 1 Cook on Stock and Stockholders, § 89. *Contra*, Spartanburg, etc., R. Co. *v.* De Graffenreid, 12 Rich. L. (S. C.) 675.

[8] New Albany, etc., R. Co. *v.* McCormick, 10 Ind. 499. See, also, Nichols *v.* Burlington, etc., Co., 4 Greene (Iowa) 42; Spartanburg, etc., R. R. Co. *v.* De Graffenreid, 12 Rich. L. (S. Car.) 675.

for stock taken must be specially demanded by the corporation, if no time is fixed for delivery.[1] And upon the failure of the subscriber to furnish the property, the subscription becomes payable in cash.[2]

§ 117. **Construction of conditional subscriptions—What is a sufficient compliance with condition as to time of beginning and completing road.**—The conditions most commonly annexed to subscriptions to the stock of a railroad company relate to the time of beginning and completing the road, or to the route over which the road shall run. Where the condition requires the railroad to be begun or finished before a certain date, it is held that time is of the essence of the contract,[3] and the subscriber may be discharged from liability by a failure to comply with the condition. But a substantial compliance is sufficient,[4] while a mere colorable compliance with a condition that the road should be completed and a train run over the road by laying a temporary track, over which an engine and a few cars are run, but

[1] Ohio, etc., R. Co. *v.* Cramer, 23 Ind. 490. See McClure *v.* People's R. Co., 90 Pa. St. 269.

[2] Haywood, etc., R. R. Co. *v.* Bryan, 6 Jones L. (N. Car.) 82; Sperry *v.* Johnson, 11 Ohio 452.

[3] Jackson *v.* Shortridge, 29 Tex. 394; Ticonic, etc., Co. *v.* Lang, 63 Me. 480; Burlington, etc., R. Co. *v.* Boestler, 15 Iowa 555; Memphis, etc., R. Co. *v.* Thompson, 24 Kan. 170; Freeman *v.* Matlock, 67 Ind. 99. But see Johnson *v.* Kessler, 76 Iowa 411, s. c. 41 N. W. R. 57.

[4] Missouri Pac. R. Co. *v.* Tygard, 84 Mo. 263; Hall *v.* Sims, (Ala.), 17 So. R. 534; Southern Kansas, etc., R. Co. *v.* Towner, 41 Kan. 22; Freeman *v.* Matlock, 67 Ind. 99; Brocaw *v.* Board, etc., 73 Ind. 543; Fort Worth, etc., R. R. Co. *v.* Williams, (Tex.) 18 S. W. R. 206. Williams *v.* Ft. Worth, etc., R. Co., 82 Tex. 553. The road may be subtantially built to a certain point, although a depot has not been erected nor a station agent employed. Ogden *v.* Kirby, 79 Ill. 555. The court held it a substantial compliance where the road was not finally completed for two and a half months after the stipulated time. De Moines Valley R. Co. *v.* Graff, 27 Iowa 99, s. c. 1 Am. R. 256. A condition in the vote of bonds by a county in aid of a railroad company, that it shall establish and maintain a division terminus at a point situated between two named cities in the county, is substantially complied with if the terminus is established at a point on the line of the road between the two cities a few rods off from a direct line between them. Chicago, K. & W. R. Co. *v.* (Board, etc.) Harris, 49 Kan. 399, 30 Pac. R. 456. See, also, Wullenwaber *v.* Dunigan, 30 Neb. 877.

which must be replaced by another before regular trains can be run, would not be sufficient to bind the subscriber.[1] A condition that "cars shall run to B, upon a completed railroad from B," is, however, sufficiently complied with by running leased cars over the road.[2] Where payment is to be made upon completion of a portion of the road, it is not necessary that it be made a first-class road before payment can be enforced, but the specified portion must be substantially finished and capable of being operated for the transaction of railroad business.[3] Upon

[1] Freeman *v.* Matlock, 67 Ind. 99; Brocaw *v.* Board, etc., 73 Ind. 543; Paris, etc., R. Co. *v.* Henderson, 89 Ill. 86. The condition is not fulfilled by making a temporary arrangement by which cars are run to the required terminus over a portion of another company's track. Lawrence *v.* Smith, 57 Iowa 701; Indianapolis, etc., R. Co. *v.* Holmes, 101 Ind. 348. A person subscribed $5,000 in aid of a railroad company, "one half of said sum to be due and payable when said company shall construct or secure a continuous line of railway from T. to M." Trains ran from T. into M. over the road in the specified time, but the road belonging to the company only extended to D., and from D. to T. trains were run over the road of another company under an arrangement by which the track was to be used by the new company, but in subordination to the use of the company owning. The court held that there was no performance under which the subscriber could be held upon his subscription. Brown *v.* Dibble, 65 Mich. 520, 32 N. W. 656. See, also, Tabor, etc., R. R. Co. *v.* McCormick, (Iowa) 57 N. W. R. 949. But see People *v.* Holden, 82 Ill. 93, where the company used one mile of track and terminals belonging to another railroad company in order to reach one of the towns named in the condition, and it was held to be a sufficient compliance to render the subscriber liable. A notice of election stated that the question to be submitted was whether aid should be voted for the construction of a railroad between W. and a point on the W. R. Co. in W. county, the petition stated that the road should be completed so that trains could be run from W. to L. on the line of the W. R. Co. by a stated time. It was held that the company was not required to build an independent, continuous line to L., but a junction with the W. R. Co. was sufficient. Young *v.* Webster City & S. W. R. Co., 75 Iowa 140.

[2] Courtright *v.* Deeds, 37 Iowa 503.

[3] Armstrong *v.* Karshner, 47 Ohio St. 276. When the company has constructed a road which is reasonably safe, fit and convenient for the public use and accommodation, as new railroads are ordinarily used in similar localities, it has complied with a condition in a vote of a municipal corporation granting aid in the construction of the railroad, that it shall be paid when the road is completed for use. Where an act providing for the issuance of bonds for the purpose of aiding a railroad authorizes preferred stock to be issued to the county extending the aid when the road is completed, the county will be estopped to deny that the road is completed if it receives and retains stock. Lan-

such a completion of the specified part of the road the subscription becomes an absolute one.[1]

§ 118. **Subscriptions payable as work progresses, or upon expenditure of a certain amount.**—Subscriptions are sometimes made payable as the work progresses, or upon the construction of a certain portion of the work, or the expenditure of a certain sum or percentage. Such a stipulation in the contract of subscription may operate as a waiver of the implied condition that all the stock shall be subscribed before any subscription can be collected, and an agreement by subscribers to pay their subscription as the work progresses, in order to enable the company to build a certain portion of the road, will operate as such a waiver and render such subscribers liable to pay their subscription as the specified portion of the work is done under the agreement.[2] Where a subscription when made

caster County *v.* Cheraw & C. R. Co., 28 S. C. 134, 5 S. E. 338.

[1] Webb *v.* Baltimore, etc., R. Co., 77 Md. 92, 54 A. & E. R. Cas. 202. The entire road need not be completed in such a case before the subscription can be collected. Gardner *v.* Walsh, 95 Mich. 505, s. c. 59 Am. & Eng. R. R. Cas. 1.

[2] Anderson *v.* Middle & East Tenn. Cent. R. Co., 91 Tenn. 44, 52 Am. & Eng. R. Co. 149. In this case subscribers to the capital stock of a railroad chartered to run from Gallatin to Knoxville, a distance of one hundred and fifty miles, signed an agreement to pay their subscriptions "as fast as the work progressed," upon a section of the road eleven and one-half miles long, extending from Hartsville to a point on the Chesapeake and Nashville railroad, eight and one-half miles from Gallatin, which they agreed should be constructed before the company had procured sufficient finances to build the whole road. They were held liable to pay their subscriptions upon suit brought to enforce payment when seventy per cent. of the work had been done upon such section of the road, although the company was insolvent, and wholly unable to complete the road as originally contemplated, and although the subscribers were business men of Gallatin, whose object in taking stock was to secure an outlet from their city to Knoxville. The court said that they were estopped by their express agreement to deny their liability as subscribers, for by such an agreement they waived the conditions, express and implied, annexed to their original contract of subscription. A company, having accepted a donation from a city, in consideration that it permanently establish its terminus, main office, shops and car works in said city, has fulfilled its obligation when the terminus, office, shops and car works have been established therein without any intention of removing them, and the company can not be compelled to keep them there when the interests of the road and of

was unauthorized and invalid because the company had not, at that time, expended ten per centum of its authorized capital in the construction of its road, nor obtained actual *bona fide* subscriptions to its capital stock, to the amount of twenty per cent. thereof, as required by statute,[1] it was held that such subscription could be enforced against the subscriber, after the company had fully complied with its conditions.[2] Although originally invalid, it constituted a continuing offer by the subscriber to pay the company the amount subscribed, upon the performance by it of the prescribed conditions, which, when not withdrawn before the conditions were fully complied with, became an absolute subscription, and was no longer open to the objection that the company was without corporate capacity to receive it. But a requirement in the subscription that certain things be done must clearly appear to be intended as a condition precedent, or it will not be construed to have that effect.[3]

§ 119. **Failure to perform parol condition will not defeat subscription.**—A condition will not be permitted to defeat a subscription unless clearly required by what is set forth in the writing,[4] for, in the absence of fraud, or mistake, the written subscription can not, as a rule, be varied or controlled by parol evidence.[5] Thus, it was held in a recent case, that "it is no defense in an action on a railroad aid subscription, conditioned on the completion of the road to Iowa Falls, by September 1, 1884, that the company had broken an oral promise, which was part of the consideration, to complete the line from

the public require a removal. The city is relegated to its remedy for a breach by action for damages. Texas & P. R. Co. *v.* Marshall, 136 U. S. 393, 34 L. Ed. 385, 8 Ry. & Corp. L. J. 162, 10 Sup. Ct. Rep. 846, 42 Am. & Eng. R. Cas. 637.

[1] Rev. Stat. Ohio, § 3298.

[2] Armstrong *v.* Karshner, 47 Ohio 276, s. c. 24 N. E. Rep. 897.

[3] Armstrong *v.* Karshner, *supra;* Johnson *v.* Kessler, 76 Iowa 411, s. c. 41 N. W. Rep. 57.

[4] Cairo, etc., R. Co. *v.* Delap, 7 Brad. (Ill.) 60; Johnson *v.* Georgia Midland, etc., R. Co., 81 Ga. 725.

[5] Low *v.* Studabaker, 110 Ind. 57; Johnson *v.* Georgia Midland, etc., R. Co., 81 Ga. 725; Tabor, etc., R. R. Co. *v.* McCormick, (Iowa), 57 N. W. R. 949. But compare Lake Manawa R. R. Co. *v.* Squire, (Iowa), 57 N. W. R. 307.

Iowa Falls to Forest City within one year from the date fixed in the contract for the completion of the road to Iowa Falls, and that the company had abandoned the project of building the line between those points. The rights of the parties are governed by the written contract, and parol evidence is not admissible to show a condition not embodied in the written agreement."[1]

§ 120. **Conditions in notes.**—A note payable two years after the road is completed and trains are running to a certain point and expressed to be in consideration of the completion of the line within sixty days, is not defeated by a failure to complete it within such time,[2] and a note payable when the track is laid and cars run thereon can not be defeated by showing that the consideration for such note was that the track should be so laid within three years of its date.[3] But a long delay in constructing the road may defeat a note given upon this condition.[4] The words "the road to be finished by September 1, 1872," in such a note will not imply a condition precedent.[5] Notes made payable when the railroad between two points "with the privilege of entering Atlanta, Ga., on the track of any railroad having terminal facilities there," is graded and ready for the cross-ties, trestles and bridges, were held payable when the grading was done, although the road had not yet acquired such privilege.[6] And when the notes were payable at specified times "as the work progressed through the county,

[1] Blair *v.* Buttolph, 72 Iowa 31, 33 N. W. R. 349.

[2] Traer *v.* Stuart, 46 Iowa 15.

[3] Cairo, etc., R. Co. *v.* Delap, 7 Brad. (Ill. App.) 60.

[4] A period of fourteen years is not "a reasonable time" within which to build a railroad, where it is the evident intent of the parties that the road should be completed within "a reasonable time," so as to render subscribers to capital stock liable on notes payable when cars shall be running. Blake *v.* Brown, 80 Iowa 277.

[5] Davis *v.* Cobban, 39 Iowa 392.

[6] Johnson *v.* Georgia Midland, etc., R. Co., 81 Ga. 725, s. c. 8 S. E. R. 531. The court, by Bleckly, C. J., says: "There was no stipulation that the privilege of entering Atlanta was to be secured before the notes became payable. The clause relating to that privilege was introduced to describe the railroad as it was to be ultimately, not as it was to be at the maturity and payment of the subscriptions to the capital stock."

provided the company establish a depot" at a certain place, the condition to erect a depot was held not a condition precedent.[1]

§ 121. **Subscriptions conditioned upon location or construction of the road.**—A subscription conditioned upon the location of the railroad through a certain town becomes absolute when such location is permanently made, although the road has not been constructed.[2] So, where the subscription was payable at such times and in such installments as the directors should prescribe, provided the road should be "permanently located" on a certain route, and a "freight house and depot be built" at a certain point, the provision that the buildings be erected was held to be a stipulation merely, and not a condition precedent, to be performed before the subscription could be collected.[3] And so a stipulation that the road should be operated independently of an existing railroad was held to relate to what should be done after payment was made and the road was completed.[4] Where the subscribers promised to pay the sums set opposite their names, in equal installments at six, twelve and eighteen months from a certain date, to be used only toward paying the damages and costs in acquiring the right of way, if the plaintiff's railroad should be permanently located and constructed through Lexington, it was held that the construction of the road was not a condition precedent.[5] It is generally held, in accordance with the authorities already cited, that a subscription, made upon the express condition that

[1] Paducah, etc., R. Co. *v.* Parks, 86 Tenn. 554; Fort Worth, etc., R. R. Co. *v.* Williams, (Tex.) 18 S. W. R. 206; Williams *v.* Fort Worth, etc., R. Co., 82 Tex. 553.

[2] Smith *v.* Allison, 23 Ind. 366; McMillan *v.* Maysville, etc., R. R. Co., 15 B. Mon. (Ky.) 218, s. c. 61 Am. Dec. 181; North Missouri, etc., R. R. Co. *v.* Winkler, 29 Mo. 318; Miller *v.* Pittsburgh, etc., R. R. Co., 40 Pa. St. 237, s. c. 80 Am. Dec. 570 (where subscription said "located and constructed"); Berryman *v.* Cincinnati Southern Ry., 14 Bush (Ky.) 755 (same as last case).

[3] Chamberlain *v.* Painesville, etc., R. Co., 15 Ohio St. 225; Ashtabula, etc., R. Co. *v.* Smith, 15 Ohio St. 328.

[4] Johnson *v.* Georgia Midland, etc., R. Co., 81 Ga. 725, 8 S. E. R. 531.

[5] Berryman *v.* Cincinnati, etc., R. Co., 14 Bush (Ky.) 755. But see Burlington, etc., R. R. Co. *v.* Boestler, 15 Iowa 555.

the company shall locate and construct its railroad to a certain point, becomes payable at the time or times mentioned in the contract of subscription, if the railroad shall have been located at that point, and that the construction of the road, unless expressly made so, is not a condition precedent to the payment of the subscription.[1] Where the subscription is made upon condition that the road be "built" to a certain point, the money is payable upon call when the road is permanently located, in good faith, upon the designated route.[2] And the same rule applies where the condition is that the railway shall "pass" through a certain country.[3] Payment of such a subscription may be enforced, it seems, although work upon the road has been suspended from lack of means to prosecute it. To permit the subscriber to set up such a suspension as a defense in a suit to collect the subscription would be to permit him to take advantage of his own wrong and bad faith in refusing to pay what he agreed to pay at a time fixed in order that the company might have means with which to build the road.[4] It is now established by the decided weight of authority that stock may be subscribed or money donated to a railroad company upon condition that it will locate or build its road upon a specified route not inconsistent with its charter, and which does not plainly conflict with the interests of the public; and that any such agreement to take stock or to pay money will become binding when the road is so located.[5]

[1] Miller *v.* Pittsburgh, etc., R. Co., 40 Pa. 237, s. c. 80 Am. Dec. 570; McMillan *v.* Maysville, etc., R. Co., 15 B. Mon. (Ky.) 218.

[2] Warner *v.* Callender, 20 Ohio St. 190; Swartwout *v.* Michigan Air Line R. Co., 24 Mich. 389; Woonsocket Union R. Co. *v.* Sherman, 8 R. I. 564. In this latter case the subscription was payable "if the road is built" through a certain village.

[3] Ashtabula, etc., R. Co. *v.* Smith, 15 Ohio St. 328; Chamberlain *v.* Painesville, etc., R. Co., 15 Ohio St. 225; North Missouri R. Co. *v.* Winkler, 29 Mo. 318.

[4] Miller *v.* Pittsburgh, etc., R. Co., 40 Pa. St. 237, s. c. 80 Am. Dec. 570.

[5] Jewett *v.* Lawrenceburgh, etc., R. Co., 10 Ind. 539; Missouri Pacific R. Co. *v.* Taggard, 84 Mo. 263; Tygard *v.* Western Md. R. Co., 24 Md. 563, s. c. 89 Am. Dec. 760; Connecticut, etc., R. Co. *v.* Baxter, 32 Vt. 805; Cumberland Valley R. Co. *v.* Baab, 9 Watts (Pa.) 458; Mansfield, etc., R. Co. *v.* Brown, 26 Ohio St. 223; Des Moines, etc., R. Co. *v.* Graff, 27 Iowa 99; Nashville, etc., R. Co. *v.* Jones, 2 Cold. (Tenn.) 574; Burlington, etc., R. Co. *v.* Boestler, 15 Iowa 555; Swartwout *v.* Michigan, etc., R. Co., 24 Mich. 389; Paris,

§ 122. **Effect of alteration in route fixed by charter.**—Generally, if a subscription be made to a railroad, whose route is fixed by its charter, any material alterations in such route, made without his consent, will release the subscriber from liability.[1] In a Georgia case where the southern terminus was changed by act of the legislature, passed upon application of the corporation, from Hawkinsville to Thomasville, and the authorized capital was greatly increased, the court held that a dissenting subscriber was released by such alterations, although, when he subscribed, the general law under which the first charter was obtained authorized amendments to be made to the charter, the route to be changed, and the capital stock to be increased.[2] The same is true if the subscription paper specifies the route and termini, and material alterations are made in them after it

etc., R. Co. *v.* Henderson, 89 Ill. 89; Martin *v.* Pensacola, etc., R. Co., 8 Fla. 370; Bucksport, etc., R. Co. *v.* Brewer, 67 Me. 295; Agricultural, etc., R. Co. *v.* Winchester, 13 Allen (Mass.) 29; Charlotte, etc., R. Co. *v.* Blakely, 3 Strobh. (S. C.) 245; Woonsocket, etc., R. Co. *v.* Sherman, 8 R. I. 564; Buffalo, etc., R. Co. *v.* Pottle, 23 Barb. (N. Y.) 21; McMillan *v.* Maysville, etc., R. Co., 15 B. Mon. (Ky.) 218, s. c. 61 Am. Dec. 181; Racine Co. Bank *v.* Ayres, 12 Wis. 512; Rose *v.* San Antonio, etc., R. Co., 31 Tex. 49; Moore *v.* Hanover Junction R. Co., 94 Pa. St. 324; Cedar Rapids, etc., R. Co. *v.* Spafford, 41 Iowa 292; Cayuga Lake, etc., R. Co. *v.* Kyle, 5 T. & C. (N. Y.) 659. *Post*, §§ 362, 363. But see Pacific R. Co. *v.* Seely, 45 Mo. 212; Woodstock Iron Co. *v.* Richmond, etc., Extension Co., 129 U. S. 643, s. c. 9 Sup. Ct. R. 402; Florida, etc., R. Co. *v.* State, 31 Fla. 482, s. c. 13 So. R. 103; St. Louis, etc., R. Co. *v.* Mathers, 104 Ill. 257; St. Joseph, etc., R. Co. *v.* Ryan, 11 Kan. 602. An agreement to pay a stated sum to secure the location of a railroad upon a specified route was upheld and enforced on the ground that the public interest was not opposed to the location required by the condition, in First National Bank *v.* Hendre, 49 Iowa 402. A condition involving the location of the proposed route of a turnpike company's road has been held void in New York as an attempt to influence by improper means the decision of a question in which public interests are involved, and therefore against public policy. Butternuts, etc., T. Co. *v.* North, 1 Hill (N. Y.) 518; Fort Edwards, etc., Co. *v.* Payne, 15 N. Y. 583; Macedon, etc., Plank R. Co. *v.* Snediker, 18 Barb. 317. See to the same effect as to railroads, Utica, etc., R. Co. *v.* Brinckerhoff, 21 Wend. (N. Y.) 139. But see later New York cases cited, *supra*.

[1] Caley *v.* Philadelphia, etc., R. R. Co., 80 Pa. St. 363; Buckfield, etc., R. R. Co. *v.* Irish, 39 Me. 44; Danbury, etc., R. R. Co. *v.* Wilson, 22 Conn. 435.

[2] Snook *v.* Georgia Imp. Co., 83 Ga. 61.

is signed; and passing a resolution to make such a change will be evidence of an abandonment of the route as originally contemplated.[1] Where a subscription is made upon a condition as to location, the subscriber may show that the alterations made, though very slight, are material alterations as to him. Thus, where the road is constructed 1,200 feet from the subscriber's mill, instead of 500 feet, as required by the condition annexed to the subscription, it has been held that the subscriber may show that his interests are so injuriously affected by the change that he would have no inducement to subscribe stock in a road on the new location.[2] And building a railroad twenty-four hundred feet from a certain point, with a branch passing over the route mentioned in the condition, will not fulfill a requirement that the road shall be built within twelve hundred feet of the designated point.[3] But a condition that the road should be constructed from Stockton up the valley of the San Joaquin river, in the direction of another town lying to the south, was held to be substantially complied with by the construction of the road toward the east across the valley for the first few miles, and then up the valley toward the town named.[4] Where the charter empowers the corporation to change its route or termini, a subscription must, however, as a general rule, expressly make the construction of the road to a given point operate as a condition precedent or the subscription will be construed to be absolute and such changes as are deemed necessary may be made without affecting the subscriber's liability.[5] The same rule applies to a note given for donated aid, even where an improper motive prompted the change, if it was legally made.[6]

§ 123. **Effect of abandonment or sale of road.**—The fact

[1] Caley *v.* Philadelphia, etc., R. Co., 80 Pa. St. 363.

[2] Caley *v.* Philadelphia, etc., R. Co., 80 Pa. St. 363.

[3] Virginia & Truckee R. R. Co. *v.* Commissioners, 6 Nev. 68.

[4] Stockton, etc., R. R. Co. *v.* City of Stockton, 51 Cal. 328.

[5] Jewett *v.* Valley R. R. Co., 34 Ohio St. 601; Armstrong *v.* Karshner, 47 Ohio St. 276.

[6] Greenville, etc., R. R. Co. *v.* Johnson, 8 Baxter (Tenn.) 332.

that the corporation has abandoned a part of its road,[1] or has not completed, and apparently has no intention of completing it,[2] is no defense to an action for the payment of a subscription, unless the completion of the road is clearly made a condition precedent. Neither is the sale of a portion of the road under authority of a statute,[3] which provides that any dissenting stockholder may exchange his shares for shares in the purchasing company.[4] In Indiana it is provided by statute,[5] that in case of a sale of any railroad by virtue of any mortgage foreclosure, and the formation by the purchasers of a new corporation to operate the road, all subscribers to the original stock of said railroad company shall be released and discharged from all their unpaid subscriptions. "Recognizing the fact that stock in an insolvent railway company, the property of which has been sold in a foreclosure or other judicial proceeding, is worthless, this statute was intended to protect subscribers by canceling all obligations to pay unpaid subscriptions to such stock in all cases where there shall not have been an adjustment by agreement or compromise. In other words, the statute was intended to enact into a law the rule of fair dealing, that no one should be required to pay something for nothing."[6]

§ 124. **Condition as to terminus — Question of intention for jury.**—Where a condition requires the road to run to a certain named place, and there are both a township and a village of that name, it is a question of intention as to which is meant. And this is true though the village is not incorporated, if it is commonly designated by that name.[7] The question as to which is meant in such a case is to be determined by the jury upon evidence offered, like any other question of fact.[8]

[1] Armstrong *v.* Karshner, 47 Ohio St. 276; Dorman *v.* Jacksonville, etc., R. Co., 7 Fla. 265; Ogden *v.* Kirby, 79 Ill. 555.

[2] Buffalo, etc., R. Co. *v.* Gifford, 87 N. Y. 294, 22 Hun 359.

[3] Rev. Stat. Ohio, § 3409.

[4] Armstrong *v.* Karshner, 47 Ohio St. 276, S. C. 24 N. E. R. 897.

[5] Rev. Stat. Ind., § 3947.

[6] Zollars, J., in Board, etc., *v.* State, *ex rel.*, 115 Ind. 64, 88.

[7] Ogden *v.* Kirby, 79 Ill. 555.

[8] Connecticut, etc., R. Co. *v* Baxter, 32 Vt. 805.

§ 125. **What is sufficient compliance with condition as to terminus or location of depot at a certain place—Illustrative cases.**—Where subscriptions to the capital stock of a railroad company were to be paid when the road "is completed and cars running from T. to M.," it was held that payment could not be enforced when the road had been built to a point nine hundred and fifty feet from the limits of T. and in another county, at which place its terminal facilities were located. The fact that the company had built a track leading from its main line into the town of T., where it had built a platform and transacted some business, did not, it was held, constitute a compliance with the condition of the subscription, where it was shown that such track was built upon ground leased for one year, and the plaintiff's president had stated that it was not intended to be permanent. Such a condition in a subscription to the capital stock of a railroad company chartered to build a railroad from one town to another, requires that the principal business at the latter should be transacted at a point within its corporate limits.[1] Where the subscription is made upon condition that a depot be established within a certain distance of a town, the distance may be measured in a straight line from the corporate limits without regard to buildings or improvements,[2] or from the recorded plat, as it was at the time the subscription was made, and is not affected by a subsequent annexation of adjoining territory.[3] The measurement of distance is not controlled by the traveled route between the two points.[4] The location of the depot at the designated point, fulfills the condition, although the side tracks and switches are placed at a greater distance away from the town.[5] A subscription made on condition that the depot shall be located at the nearest *practicable* point within one mile of the court-house, is not violated by a failure to locate it at the nearest *possible*

[1] Tabor, etc., R. Co. *v.* McCormick, (Iowa) 57 N. W. 949.

[2] Courtright *v.* Strickler, 37 Iowa 382.

[3] Davenport, etc., R. Co. *v.* Rogers, 39 Iowa 298.

[4] Cedar Falls, etc., R. Co. *v.* Rich., 33 Iowa 113.

[5] Courtright *v.* Strickler, 37 Iowa 382.

point; but the company has fulfilled the condition when it has built a depot at the nearest point within one mile of the court-house at which it could be located at a reasonable cost, with reference to all the circumstances under which it was to be done.[1] An agreement to subscribe a certain amount of stock upon condition that the railroad company shall locate a depot at a certain point is held to become an absolute subscription, of which payment may be enforced according to its terms upon the location of the depot.[2] Where the condition is that the road shall be "permanently located to and within the town of W., with a station at the same," the condition is not fulfilled by the construction of the road through the town with a depot just outside its limits.[3]

§ 126. **General rule of construction—Performance of condition by consolidated company.**—Generally, where it can be done without doing violence to the language used, any conditions imposed will be given such a construction as will further the enterprise. And a condition relating to the construction of the road may be so far complied with by another company which builds it, as to hold the subscriber;[4] for it is usually of no importance to the subscriber who builds the road, if it is built in pursuance of the plan existing when the subscription was made. But the subscriber can, of course, limit his subscription to a single company, by express stipulation. And the consolida-

[1] Wooters *v.* International R. Co., 54 Tex. 294.

[2] North Missouri R. Co. *v.* Miller, 31 Mo. 19.

[3] Davenport, etc., R. Co. *v.* O'Conner, 40 Iowa 477.

[4] Michigan, etc., R. Co. *v.* Bacon, 33 Mich. 466. See, also, Merrill *v.* Gamble, 46 Iowa 615; Muscatine, etc., R. Co. *v.* Horton, 38 Iowa 33. The purchaser of a railroad, under a decree of foreclosure, after one installment on a township subscription to the railroad has been paid, acquires no interest in the money subscribed to the original company. Board of Commissioners *v.* State, 115 Ind. 64. A promise to pay money upon the completion of a railroad described in the contract as the Delphos, Bluffton and Frankfort Railroad, can only be enforced by the promisee upon proof that the railroad named has been completed, and it will not be sufficient to entitle the promisee to a recovery to prove that a railroad has been built, for it must be shown that the railroad described has been built. Low *v.* Studabaker, 110 Ind. 57.

tion of the railroad company with another made after the subscription, but before the stock was issued under a power existing when the subscription was made, has been held not to release a town from liability upon bonds issued in payment of such a subscription.[1] The liability upon such a subscription can not be denied where the municipality took an active part in bringing about the consolidation.[2] But where the consolidated company has a longer route and different termini than the company to which the subscription was made, and the consolidation is entered into without the consent of the subscriber, it has been held that the subscription can not be enforced.[3] Such contracts are interpreted by the same rules as other contracts, with reference to the true intent and meaning of the parties ; and in order to ascertain such intent and meaning, the circumstances under which the agreement was made may be shown.[4] The condition, to be valid, must be expressed in the subscription. Secret agreements between the subscriber and the officers of the company afford no protection to the subscriber, but the subscription will usually be enforced as an absolute one.[5]

[1] Menasha *v.* Hazard, 102 U. S. 81; City of Mt. Vernon *v.* Hovey, 52 Ind. 563. The subscription of a county to bonds in aid of a railroad is not annulled by consolidation of such railroad company with another, under a law providing that the railroad company might consolidate with other companies with the approval of two-thirds of the stock held in each company. Chicago, K. & W. R. Co. *v.* Board, etc., 36 Kan. 121, 12 Pac. Rep. 593.

[2] County of Tipton *v.* Locomotive Works, 103 U. S. 523. A township in Missouri voted bonds in aid of the C. & O. Ry. Co., whose road was not then built, and whose articles of association declared that its object was to construct and operate a railroad from C. to such point on the line between Missouri and Iowa as should be deemed the best route for operating a road between C. and Omaha, Neb. Before the bonds were issued, the C. & O. consolidated with an Iowa company, and the consolidated company proceeded to construct and operate a road from St. Louis, by way of C., to Council Bluffs, Iowa, and Omaha, and the bonds were issued to the consolidated company. The court held that as consolidation was necessary, in order to carry out the purpose for which the C. & O. Co. was organized, the existing statutory provision therefor became a part of the contract with the township, and the issuance of bonds to the consolidated company was valid. Livingston County *v.* First Nat. Bank, 128 U. S. 102, 9 Sup. Ct. Rep. 18.

[3] Rochester, etc., R. Co. *v.* Cuyler, 7 Lans. (N. Y.) 431.

[4] Detroit, etc., R. Co. *v.* Starnes, 38 Mich. 698.

[5] York Park, etc., Assn. *v.* Barnes, 39

§ 127. **Fraudulent representations in obtaining subscriptions.** — A subscription to capital stock is understood to be made upon the implied condition that the representations of the company or its officers and authorized agents and of the promoters as to the financial condition of the enterprise, the amount and kind of property which it owns, or any other existing facts that would influence subscriptions, upon the faith of which such subscription is made, shall be true and made in good faith.[1] And not only is this true, but where statements are made to induce subscriptions there must be a full and fair statement of all material facts, which it is the duty of the corporation or its agents to disclose. A suppression of part of the truth will often amount to a misrepresentation.[2] But representations, in order to be so far binding upon the corporation as to avoid the subscription in case they prove to be false, must generally relate to some fact existing either in the past or present time which has an influence upon the *status* of the corporation.[3] And it must appear that the representations

Neb. 834, 58 N. W. Rep. 440; Great Western Tel. Co. *v.* Haight, 49 Ill. App. 633; Downie *v.* White, 12 Wis. 176, s. c. 78 Am. Dec. 731; Robinson *v.* Pittsburgh, etc., R. Co., 32 Pa. St. 334, s. c. 72 Am. Dec. 792; Madison, etc., R. Co. *v.* Stevens, 6 Ind. 379; Cunningham *v.* Edgefield, etc., R. Co., 2 Head (Tenn.) 23; Minneapolis, etc., Co. *v.* Davis, 40 Minn. 110, s. c. 12 Am. St. Rep. 701. See article in 28 Am. Law Reg. (N. S.) 306.

[1] 1 Cook on Stock and Stockholders, Ch. 9.

[2] New Brunswick, etc., R. Co. *v.* Muggeridge, 1 Dr. & Sm. 363, 381; Directors, etc., of Central R. *v.* Kisch, L. R. 2 H. L. Cas. 99; Oakes *v.* Turquand, L. R. 2 H. L. Cas. 325, 2 Pom. Eq. Jur., §§ 901, 902. Where the prospectus set forth the ownership by the corporation of a piece of property claimed to be of great value, the omission to state that a very large sum of money was paid for it was held to be a fraudulent suppression of facts. Directors, etc., *v.* Kisch, *supra*. An omission to state in a prospectus how many shares have been taken by the directors is not. Directors, etc., *v.* Kisch, *supra*; Atlanta, etc., R. Co. *v.* Hodnett, 36 Ga. 669; Pulsford *v.* Richards, 17 Beav. 87, 17 Jur. 865; Heymann *v.* European, etc., R. Co., L. R. 7 Eq. 154.

[3] Edgington *v.* Fitzmaurice, L. R. 29 Ch. Div. 459. A person induced to give a note for subscription to the capital stock of a railroad by representations that only a certain amount of stock would be issued when there had already been issued a larger amount, is relieved from his subscription. Weems *v.* Georgia, M. & G. R. Co., 84 Ga. 356, 11 S. E. R. 503. So is one who is induced to subscribe by means of a false statement that certain stock has been subscribed. Arni-

were relied upon as true by the subscriber, and formed an inducement to make the subscription.[1] Any representations as to the future policy or intentions of the corporation[2] or any parol promises or agreements as to what the corporation will or will not do can not be interposed as a defense to an absolute subscription,[3] even though made with a fraudulent intent by the

son *v.* Smith, 59 L. T. R. 627; Spellier, etc., Co. *v.* Leedom, 149 Pa. St. 185. Or that a government guaranty has been obtained. Kisch *v.* Central R., etc., 34 L. J. (Ch.) 545. So, a representation that a certain prominent business man has subscribed for a large amount, when it was given to him without the payment of any purchase price therefor, is sufficient to render voidable any subscription induced by such representation. Coles *v.* Kennedy, 81 Iowa 360. And so is a false representation that certain property has been purchased and is owned by the company, and that the company is in good condition and is earning on the completed portion of the road four and one-half per cent. on the entire cost of the road, when the agent knew that the company was almost bankrupt, having neither money nor credit, and that its stock was almost worthless. Waldo *v.* Chicago, etc., R. Co., 14 Wis. 575.

[1] Authorities cited in preceding note. Jennings *v.* Broughton, 22 L. J. (N. S.) Ch. 585; Mitchell *v.* Deeds, 49 Ill. 416; Melendy *v.* Keen, 89 Ill. 395; Oregon Central R. R. Co. *v.* Scoggin, 3 Ore. 161; Sinnett *v.* Moles, 38 Iowa 25; 2 Pom. Eq. Jur., § 890. See Crump *v.* U. S. Mining Co., 7 Gratt. (Va.) 352. It is said that the misrepresentations must not only be made without an honest belief in their truth, but must have been intended for the subscriber to act upon, and he must have acted in reliance upon them. Woods' Railway Law, 116. But the authorities do not bear out this rule any further than that the subscriber must have been so far influenced by the misrepresentations as to material facts concerning the enterprise that it would operate as a fraud upon him to hold him to a contract into which he would not knowingly have entered, although there are many dicta which go much further. In an action on a note given for subscription to the stock of a railroad, defendant claimed that plaintiff when soliciting the subscription represented that the road would be stocked and bonded only to a certain amount per mile, whereas it was stocked and bonded to a much larger amount per mile, but he did not testify that he would not have subscribed and given his note if he had known how much stock and bonds had been or would be issued, and it appeared that other true representations were the chief inducement to his subscription. He was held bound by his subscription. Weems *v.* Georgia Midland & G. R. Co., 88 Ga. 303, 14 S. E. R. 583.

[2] McAllister *v.* Indianapolis, etc., R. Co., 15 Ind. 11; Topeka, etc., Co. *v.* Hale, 39 Kan. 23, 17 Pac. R. 601; Jefferson *v.* Hewitt, 95 Cal. 535; Weston *v.* Columbus, etc., R. R. Co., 90 Ga. 289, s. c. 15 S. E. R. 773; Anderson *v.* Middle & East Tenn. Cent. R. R. Co., 91 Tenn. 44, 52 Am. & Eng. R. R. Cas. 149.

[3] White Mts. R. Co. *v.* Eastman, 34 N. H. 124; LaGrange, etc., Co. *v.* Mays, 29 Mo. 64; Clem *v.* Newcastle,

company's agents in order to procure the subscription. Nor will any statement as to the legal effect of the contract of subscription, or as to the legal rights and liabilities assumed, prove a defense, for every one is bound to know the law.[1] Statements of facts, however, need not, ordinarily, be made with knowledge of their falsity; for, if the corporation or its agents mislead a subscriber by statements recklessly made in ignorance of the truth, it may not take advantage of the acts induced by

etc., R. Co., 9 Ind. 488; Smith *v.* Tallassee Branch, etc., R. Co., 30 Ala. 650; East Tenn., etc., R. Co. *v.* Gammon, 5 Sneed. (Tenn.) 567; Crossman *v.* Penrose Ferry Bridge Co., 26 Pa. St. 69; Walker *v.* Mobile, etc., R. Co., 34 Miss. 245; Ogilvie *v.* Knox Ins. Co., 22 How. (U. S.) 380; Swatara R. Co. *v.* Brune, 6 Gill. (Md.) 41; Jewett *v.* Valley R. Co., 34 Ohio St. 601; Syracuse, etc., R. Co. *v.* Gere, 4 Hun (N. Y.) 392; Oregon Central R. Co. *v.* Scoggin, 3 Ore. 161; Wight *v.* Shelby R. Co., 16 B. Mon. (Ky.) 4; Dill *v.* Wabash Valley R. Co., 21 Ill. 91; Vicksburgh, etc., R. Co. *v.* McKean, 12 La. Ann. 638; Milwaukee, etc., R. Co. *v.* Field, 12 Wis. 340; N. E. R. R. Co. *v.* Rodrigues, 10 Rich. (S. C.) 278. Proof that the execution of the contract was procured by false and fraudulent representations by the company that the means were already provided for the construction of the road between two points within the time specified, where the subscription was made upon condition that another portion of the road should be constructed within that time was held insufficient to constitute a defense to an action on the subscription. Blair *v.* Buttolph, 72 Iowa 31, 33 N. W. R. 349. A representation that payment will not be demanded until certain work is completed does not bind the company. LaGrange, etc., R. Co. *v.* Mays, 29 Mo. 64; Clem *v.* Newcastle, etc., R. Co., 9 Ind. 488. Nor does a representation that the road will be extended to a certain point. Low *v.* Studabaker, 110 Ind. 57, s. c. 10 N. E. R. 301. Or that a branch road will be built. McAllister *v.* Indianapolis, etc., R. Co., 15 Ind. 11; Guarantee, etc., Co. *v.* Weil, 141 Pa. St. 511, 21 Atl. R. 665. But it is said that if a person is induced to subscribe for stock by means of an agreement made by an officer of the corporation within the scope of his authority, the subscriber may, upon a failure of the corporation to perform the agreement, cancel his subscription and recover back the sums paid on the stock. Weeden *v.* Lake Erie etc., R. Co., 14 Ohio 563; Crossman *v.* Penrose Ferry Bridge Co., 26 Pa. St. 69. The fact that the subscription was made in reliance upon the statement of the company's agent who procured the subscription that the road would be economically built, and that the stock would prove a good investment, is no defense to an action to enforce payment. Weston *v.* Columbus Southern R. Co., 90 Ga. 289, s. c. 15 S. E. R. 773.

[1] Clem *v.* Newcastle, etc., R. Co., 9 Ind. 488; Parker *v.* Thomas, 19 Ind. 213; Upton *v.* Tribilcock, 91 U. S. 45; N. E. R. R. Co. *v.* Rodrigues, 10 Rich. (S. C.) 278; Pom. 2 Eq. Jur., § 877. But see Upton *v.* Englehart, 3 Dill. (U. S.) 496, where a misrepresentation as to the legal liability of

its own misstatements.[1] Statements which amount only to an expression of opinion, if honestly made without intent to deceive, or if made in relation to matters equally open to the knowledge of both parties, will not amount to fraudulent representations.[2] Thus, a representation that a sufficient amount of solvent stock was subscribed to complete the road within two years, and that the company was able and would complete it within that time, does not amount to a fraudulent representation even though untrue.[3] Nor would a statement that the construction company, which had undertaken to build and equip the road, was able to complete it by the use of its own resources, without any advance from the company.[4] Representations made by an agent of a railroad company in reference to the value of a donation of land made by congress to the company, and in relation to the amount of assets of the company, and its ability to complete the road within a certain time, and the probable cost and profits of the road, though false and exaggerated, and made to induce persons to subscribe for the stock, were held to be but expressions of opinion, and not to amount to fraudulent representations.[5] And representations that the road would be constructed over a certain route within a certain time, although offered as an inducement to subscribe for stock, and operating as such, have been held to be

the stockholders in a corporation organized in another state was held to be a defense.

[1] Henderson *v.* Railroad Co., 17 Tex. 560; Reese River, etc., Co. *v.* Smith, L. R. 4 H.L.64; Edgington *v.* Fitzmaurice, L. R. 29 Ch. Div. 459; 2 Pom. Eq. Jur., § 887. The courts incline very strongly to uphold subscriptions to capital stock, and many cases intimate that the person making the statement must have had a fraudulent purpose, or such knowledge as would impute such fraudulent purpose to him. Nugent *v.* Cincinnati, etc., R. Co., 2 Disney (Ohio) 302; Selma, etc., R. Co. *v.* Anderson, 51 Miss. 829; Cunningham *v.* Edgefield, etc., R. Co., 2 Head. (Tenn.) 23.

[2] Montgomery, etc., R. Co. *v.* Matthews, 77 Ala. 357; Walker *v.* Mobile R. Co., 34 Miss. 245; 2 Pom. Eq. Jur., § 878.

[3] Brownlee *v.* Ohio, etc., R. Co., 18 Ind. 68; Weston *v.* Columbus, etc., R. R. Co., 90 Ga. 289, s. c. 15 S. E. R. 773.

[4] Andrews *v.* Ohio, etc., R. Co., 14 Ind. 169.

[5] Walker *v.* Mobile, etc., R. Co., 34 Miss. 245. See, also, Union Nat. Bank *v.* Hunt, 76 Mo. 439.

no defense to an action for payment of the subscription.[1] Where the directors, in good faith and by honest mistake of judgment, added to the assets certain debts which proved not to be collectible, and thereby showed the company to be solvent, when the loss of the money represented by such debts threw it into insolvency, it was held not a fraudulent misrepresentation.[2] The same holding was made where it was stated in good faith that the corporation had a valid government contract, but, upon litigation, this was found to be untrue.[3] And it has even been held that a representation that title to land was good when in fact it was bad, if made in good faith with an honest belief that it is true is not a fraudulent misrepresentation.[4] The mere intent on the part of the company to deceive and defraud by misrepresentations is immaterial if it does not cause any damage to the subscriber.[5] Representations, false when made, but which become true by the force of intervening events before the subscription is completed, can not afterward, it seems, be complained of by the subscribers.[6]

§ 128. **Misrepresentations in prospectus and by agents generally.**—The fraudulent representations which will avoid a subscription may be made by statements contained in a prospectus issued by the authority of the directors or the stockholders of a corporation if they induced the subscription to be made.[7] Or

[1] Montgomery, etc., R. Co. *v.* Matthews, 77 Ala. 357. The court, by Stone, C. J., says: "The representations set forth in each of the special pleas * * * could be nothing but opinion. These pleas are fatally bad, because they do not aver that Kirkpatrick did not honestly entertain the opinions he expressed. See, also, Blair *v.* Buttolph, 72 Iowa 31, 33 N. W. R. 349.

[2] Jackson *v.* Turquand, L. R. 4 H. L. 305.

[3] Kennedy *v.* Panama, etc., Co., L. R. 2 Q. B. 580.

[4] New Brunswick, etc., R. Co. *v.* Conybeare, 9 H. L. Cas. 711.

[5] Keller *v.* Johnson, 11 Ind. 337; Cunningham *v.* Edgefield, etc., R. Co., 2 Head (Tenn.) 23; 2 Pom. Eq. Jur., § 898.

[6] Ship *v.* Crosskill, L. R. 10 Eq. Cas. 73.

[7] Oakes *v.* Turquand, L. R. 2 H. L. Cas. 325. See, also, Bosher *v.* Richmond, etc., Co., 89 Va. 455, 16 S. E. R. 360; 2 Pom. Eq. Jur., § 881. But due allowance must be made for high coloring and some exaggeration due to the sanguine expectations of the promoters. Directors, etc., Central R. Co. *v.* Kisch, L. R. 2 H. L. Cas. 99. The language of the prospectus will be construed in favor of the validity

they may be contained in a report made by the corporate officers to the stockholders; for a person may rely upon such a report when subscribing for stock.[1] And the corporation is chargeable with the frauds and misrepresentations of its authorized agents to procure subscriptions.[2] It was formerly held in England that the corporation was only bound by such representations as the agent was authorized to make.[3] But the rule is said to be now well established both in that country and in this that a corporation can not claim or retain the benefit of a subscription obtained through the fraud of its agents.[4] And the fact that the person making the fraudulent representations had no express authority from the corporation, or exceeded such authority, will not affect this rule, provided he was legally connected with the taking of the subscription.[5] If the corporation adopts a subscription taken without authority, it must also adopt the representations by which that subscription was procured.[6] But false representations by persons who have no authority from the company and who do not take the subscription for its benefit can not affect the binding force and

of the subscription. 1 Cook on Stock and Stockholders, § 143.

[1] New Brunswick, etc., R. Co. *v.* Conybeare, 9 H. L. Cas. 711; National, etc., Co. *v.* Drew, 32 Eng. Law and Eq. 1.

[2] Montgomery, etc., R. Co. *v.* Matthews, 77 Ala. 357; Ranger *v.* Great Western R. Co., 5 H. L. Cas. 72. If the president had no authority to take subscriptions and did not in fact take the subscription, the subscriber can not charge the company with fraud because of any representations he may have made. Rives *v.* Montgomery South Plank R. Co., 30 Ala. 92. And the subscriber is bound to know that commissioners with statutory powers to take subscriptions can not bind the corporation by any representations which they may make. Bavington *v.* Pittsburgh, etc., R. Co., 34 Pa. St. 358; Wight *v.* Shelby R. Co., 16 B. Mon. (Ky.) 4; Syracuse, etc., R. Co. *v.* Gere, 4 Hun (N. Y.) 392; North Carolina R. Co. *v.* Leach, 4 Jones L. (N. C.) 340.

[3] Cook on Stock and Stockholders, § 139. In Pennsylvania the corporation is held bound only when it has clothed the agent with actual or apparent authority to make representations. Custar *v.* Titusville, etc., Co., 63 Pa. St. 381.

[4] Cook on Stock and Stockholders, § 140.

[5] Crump *v.* United States Min. Co., 7 Gratt. (Va.) 352, s. c. 56 Am. Dec. 116; Waldo *v.* Chicago, etc., R. R. Co., 14 Wis. 575.

[6] Crump *v.* United States Min. Co., 7 Gratt. (Va.) 352. See, also, Walker *v.* Mobile, etc., R. R. Co., 34 Miss. 245.

validity of the subscriptions.[1] Parol declarations and representations made by an officer of the corporation at a public meeting, though false and made with intent to deceive, will not ordinarily so far bind the corporation as to release a subscription made in reliance upon them.[2] The subscriber must be presumed to know that an officer has received no authority from the corporation to bind it in this manner;[3] and there could be but little security for the creditors of a corporation if it were held answerable for all the declarations of its officers made outside the scope of their authority.[4] The question as to whether the person making the false representations had authority from the corporation to act as its agent is usually a question of fact for the jury.[5]

§ 129. **Fraud may be shown by parol evidence.**—The fraud may be established by parol evidence,[6] since this only goes to show that no contract was formed, and not to vary it as made.[7] This rule does not, therefore, conflict with the general rule that parol evidence is not admissible to alter or vary the terms of a written contract. On the contrary, it is in accord with

[1] Cunningham *v.* Edgefield, etc., R. Co., 2 Head. (Tenn.) 23. See, also, Miller *v.* Wild Cat, etc., Co., 57 Ind. 541, holding that an agent taking subscriptions before the incorporation of the company can not bind it by his misrepresentations. An agent must at least have implied or apparent authority before he can bind his principal. 2 Pom. Eq. Jur., § 909.

[2] Buffalo, etc., R. Co. *v.* Dudley, 14 N. Y. 336; First Nat. Bank *v.* Hurford, 29 Iowa 579. A different rule is announced in Wisconsin and Georgia, but the rule in the text is most consonant with the current of authority. See Atlanta, etc., R. Co. *v.* Hodnett, 36 Ga. 669; McClellan *v.* Scott, 24 Wis. 81. See, also, Weems *v.* Georgia, etc., R. R. Co., 88 Ga. 303, 14 S. E. R. 583, where the question was submitted to the jury.

[3] Smith *v.* Tallassee Branch, etc., R. Co., 30 Ala. 650.

[4] Vicksburg, etc., R. Co. *v.* McKean, 12 La. Ann. 638.

[5] Kelsey *v.* Northern, etc., Co., 45 N. Y. 505; Crump *v.* United States Min. Co., 7 Gratt. (Va.) 352.

[6] Jewett *v.* Valley R. Co., 34 Ohio St. 601; N. Y. Exchange Co. *v.* De Wolf, 31 N. Y. 273; New Orleans, etc., R. Co. *v.* Williams, 16 La. Ann. 315; Henderson *v.* R. R. Co., 17 Tex. 560; Wert *v.* Crawfordsville, etc., Co., 19 Ind. 242; Connecticut, etc., R. R. Co. *v* Bailey, 24 Vt. 465, s. c. 58 Am. Dec. 181.

[7] 2 Beach on Priv. Corp., § 530; "Subscriptions to Capital Stock," by James M. Kerr, 6 Ry. Corp. L. J. 422.

the rule that parol evidence is admissible, especially in case of fraud, to show that there never was, in reality, a valid agreement.[1]

§ 130. **Subscriber must be free from negligence, in order to be released upon the ground of fraud.**—In order to secure a release from his subscription upon the ground that his subscription was induced by fraud, the subscriber must show that he was not misled by his own negligence in not making prudent inquiries.[2] For where both parties have equal access to the means of information, the subscriber has no right to rely entirely upon the representations of the agent, unless some means or artifices are used to prevent investigation.[3] A subscriber who reads contradictory statements in different documents can not rely upon a part only of such representations without investigation.[4] But where the facts are such as are within the knowledge of the corporation and its agents, the subscriber is only bound to exercise reasonable caution in accepting as true the representations made.[5] He is not bound to pursue independent inquiries, even though they would have shown him the falsity of the statements made by the agent or contained in the prospectus.[6]

§ 131. **Subscription induced by fraud is merely voidable. —When it will be enforced.**—A subscription induced by fraudulent representations is voidable only, and not void;[7] and

[1] Clark on Contracts, 569, 570; 2 Rice on Ev. 259, 292.

[2] Upton *v.* Englehart, 3 Dill. (U. S.) 496; Hughes *v.* Antietam Mfg. Co., 34 Md. 316; Davis *v.* Dumont, 37 Iowa 47; Custar *v.* Titusville, etc., Co., 63 Pa. St. 381; Connecticut, etc., R. R. Co. *v.* Bailey, 24 Vt. 465, s. c. 58 Am. Dec. 181.

[3] Walker *v.* Mobile, etc., R. Co., 34 Miss. 245; Jennings *v.* Braughton, 22 L. J. (Ch.) 585.

[4] Scholey *v.* Central R. Co., L. R. 9 Eq. Cas. 267, n.

[5] New Brunswick, etc., R. Co. *v.* Muggeridge, 1 Dr. & Sm. 363; Upton *v.* Englehart, 3 Dill. (U. S.) 496; Directors, etc., Central R. Co. *v.* Kisch, L. R. 2 H. L. Cas. 99.

[6] Documents referred to in the prospectus need not be examined, even though they would show the falsity of statements made therein. Kisch *v.* Central R. Co., 34 L. J. (Ch.) 545; Directors, etc., Central R. Co. *v.* Kisch, L. R. 2 H. L. Cas. 99.

[7] Upton *v.* Englehart, 3 Dill. (U. S.) 496; Reese River Min. Co. *v.* Smith,

is binding on both parties unless disaffirmed or rescinded.[1] If fraud is established, however, no action can be maintained by the corporation to recover, either upon the original subscription or upon a note given therefor,[2] unless the subscriber has ratified it or in some way become estopped, and the subscriber may recover back whatever money he has paid before discovery of the fraud.[3] Where, however, his subscription was made in pursuance of a fraudulent purpose he may not complain that his strict legal liabilities are enforced.[4] A subscription, absolute on its face, made under a secret agreement with the directors of the company, by which the subscriber was to be permitted to reduce the number of shares taken after it had operated as an inducement to others to subscribe, should be enforced according to its terms.[5] And, in general, a secret agreement between the company and subscriber, lessening his liability and changing the ostensible terms of the subscription, can neither be enforced nor successfully used as a defense to defeat his subscription. To release the subscriber would operate as a fraud upon the other subscribers and the corporate creditors.[6]

§ 132. **Ratification and estoppel — Rescission.** — The sub-

L. R. 4 H. L. 64; Cunningham *v.* Edgefield, etc., R. Co., 2 Head (Tenn.) 23.

[1] Tennent *v.* City of Glasgow Bank, L. R. 4 App. Cas. 615.

[2] 1. Occidental Ins. Co. *v.* Ganzhorn, 2 Mo. App. 205. But an innocent third person may enforce such a note where it is negotiable and is taken by him upon a valuable consideration in the usual course of business. Andrews *v.* Hart, 17 Wis. 297.

[3] Atkinson *v.* Pocock, 1 Exch. 796, 12 Jur. 60; Jarrett *v.* Kennedy, 6 C. B. 319; Grangers' Ins. Co. *v.* Turner, 61 Ga. 561.

[4] Litchfield Bank *v.* Peck, 29 Conn. 384. The subscribers "could not be permitted to set up any fraud to which they were a party, as a ground for their own discharge." Southern P. R. Co. *v.* Hixon, 5 Ind. 165, 169. See County of Crawford *v.* Pittsburgh, etc., R. Co., 32 Pa. St. 141; Downie *v.* White, 12 Wis. 176.

[5] White Mountain R. Co. *v.* Eastman, 34 N. H. 124.

[6] Meyer *v.* Blair, 109 N. Y. 600, s. c. 4 Am. St. Rep. 500; York Park, etc., Ass'n *v.* Barnes, 39 Neb. 834, 9 Lewis Am. R. R. and Corp. Rep. 240, 244; Graff *v.* Pittsburgh, etc., R. R. Co., 31 Pa. St. 489; Miller *v.* Hanover, etc., R. R. Co., 87 Pa. St. 95, s. c. 30 Am. Rep. 349; Melvin *v.* Lamar Ins. Co., 80 Ill. 446, s. c. 22 Am. Rep. 199. See, also, Chubb *v.* Upton, 95 U. S. 665; Schaeffer *v.* Missouri Home, etc., Co., 46 Mo. 248; Howard *v.* Glenn, 85 Ga. 238, s. c. 11 S. E. Rep. 610; 2 Beach on Priv. Corp., § 543; 2 Thomp. Corp., § 1400.

scriber should take steps to have his subscription cancelled within a reasonable time after he discovers the fraud; for, if he permits the interests of other subscribers and corporate creditors to attach by reason of his delay, his own laches will be a bar to his relief in equity.[1] And any acts on his part after he has knowledge of the fraud, which are inconsistent with an intention to disaffirm the subscription contract will be held to amount to a ratification, and render it absolutely binding.[2] He may also be guilty of laches in failing to inform himself as to facts which would give him notice of the fraud that has been practiced upon him. It is held that it is the duty of a person taking shares in a company to inform himself as to the provisions of the articles of association, they being registered, and he must take the consequences of his neglect to do so,[3] and if they show that the representations by which he was induced to subscribe were untrue, he must rescind within a reasonable time after he has an opportunity to know the truth by consulting them. But it has been held that he is not guilty of laches until after he has knowledge of the fraud, or of facts which should reasonably put him on inquiry, and that he is not chargeable with knowledge of facts disclosed at a stockholders' meeting at which he was not present but was represented by the perpetrator of the fraud, to whom he

[1] Graff *v.* Pittsburgh, etc., R. Co., 31 Pa. St. 489; Chubb *v.* Upton, 95 U. S. 665; *Re* London, etc., Ins. Co., L. R. 24 Ch. Div. 149; Heymann *v.* European Central R. Co., L. R. 7 Eq. Cas. 154; Schaeffer *v.* Missouri Home Ins. Co., 46 Mo. 248; Cook on Stock and Stockholders, § 161; 2 Thomp. Corp., § 1438, *et seq.*

[2] Upton *v.* Jackson, 1 Flipp. (U. S.) 413; Chubb *v.* Upton, 95 U. S. 667; City Bank *v.* Bartlett, 71 Ga. 797; 2 Thomp. Corp., § 1377. Selling part of his stock is a waiver. Ayre's Case, 25 Beav. 513. So, also, is instructing his broker to sell. *Ex parte* Briggs, L. R. 1 Eq. 483. And so is participation in stockholders' meetings. Chaffin *v.* Cummings, 37 Me. 76. But attendance on a meeting has been held not to be a waiver. Stewart's Case, L. R. 1 Ch. App. 574. And the same has been held as to voting shares by proxy. Greenville, etc., R. Co. *v.* Coleman, 5 Rich. L. (S. C.) 118; McCully *v.* Pittsburgh, etc., R. Co., 32 Pa. St. 25. Paying a call after knowledge of the fraud is held to be a waiver. Scholey *v.* Central R. Co., L. R. 9 Eq. 267, n.

[3] Oakes *v.* Turquand, L. R. 2 H. L. 325.

had given his proxy.[1] If he elects to rescind the contract, he must do so *in toto*, and must generally tender back his stock certificates.[2] In England,[3] and apparently by the weight of authority in this country,[4] it is held that a subscription can not be rescinded on the ground that it was induced by fraudulent representations unless proceedings are begun before the corporation becomes insolvent, or, at least, while it is a "going concern."[5]

[1] Virginia Land Co. *v.* Haupt, (Va.) 19 S. E. R. 168, s. c. 9 Lewis's Am. R. R. & Corp. Rep. 235.

[2] Parks *v.* Evansville, etc., R. Co., 23 Ind. 567. A subscriber to stock can not rescind for fraud, when he has had the stock transferred to his infant children, unless their right thereto is also tendered back. Francis *v.* New York, etc., R. Co., 108 N. Y. 93. But compare *Ex parte* West, 56 Law Times R. (N. S.) 622.

[3] Tennent *v.* City of Glasgow Bank, L. R. 4 App. Cas. 615; Reese River Co. *v.* Smith, L. R. 4 H. L. 64; Oakes *v.* Turquand, L. R. 2 H. L. Cas. 325; Kent *v.* Freehold, etc., Co., L. R. 3 Ch. App. 493.

[4] Duffield *v.* Barnum, etc., Works, 64 Mich. 293, 31 N. W. 310; Saffold *v.* Barnes, 39 Miss. 399; Ruggles *v.* Brock, 6 Hun (N. Y.) 164; Chubb *v.* Upton, 95 U. S. 665; Ogilvie *v.* Knox Ins. Co., 22 How. (U. S.) 380; Clarke *v.* Thomas, etc., Co., 34 Ohio St. 46.

[5] This was the rule in our bankruptcy courts under the bankrupt act of 1867. Farrar *v.* Walker, 13 Nat. Bankr. Reg. 82. See, also, Upton *v.* Tribilcock, 91 U. S. 45; Turner *v.* Grangers, etc., Co., 65 Ga. 649, s. c. 38 Am. R. 801; Cunningham *v.* Edgefield, etc., R. R. Co., 2 Head (Tenn.) 23. Certainly this is true where there is unreasonable delay and the rights of creditors are involved. In Bosher *v.* Richmond, etc., Co., 89 Va. 455, s. c. 16 S. E. R. 360, where several subscriptions had been obtained by means of fraudulent representations in a prospectus, it was held that such subscribers had a common interest, and several might join in a bill for the benefit of themselves and others similarly situated, to set aside their subscriptions.

CHAPTER VIII.

CALLS AND ASSESSMENTS.

§ 133. When payment of subscription must be made.
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§ 133. When payment of subscription must be made.—Where a subscription contains a promise to pay upon a certain day, the subscriber is bound to pay at that time without further notice or he is liable to suit immediately upon his default,[1] and he is also bound, in the absence of any provision

[1] Estell *v.* Knightstown, etc., Turnp. Co., 41 Ind. 174; Beckner *v.* Riverside, etc., Turnp. Co., 65 Ind. 468; Waukon, etc., R. Co. *v.* Dwyer, 49 Iowa 121. A subscription may regulate the time of payment. N. J. Midland R. Co. *v.* Strait, 35 N. J. L. 322; Roberts *v.* Mobile, etc., R. Co., 32 Miss. 373. Even though the statute fixes the time of payment. Iowa, etc., R. Co. *v.* Perkins, 28 Iowa 281. See, also, West *v.* Crawford, 80 Cal. 19, s. c. 21 Pac. Rep. 1123.

in the subscription, if the charter or a general statute specifies the time of payment, to pay at the designated time.[1] The same is true where the subscription is made payable upon the happening of a certain event and at stated periods thereafter. The subscriber must know when his subscription becomes payable.[2] The stockholder may pay his subscription as soon after the corporation is organized as he may choose, without awaiting the formality of a call,[3] if he act in good faith.[4] But where the capital stock is to be paid at such times and in such installments as may be required by the president and directors, such a requirement, being an uncertain event, forms a condition which, as between the corporation and the stockholder, suspends the obligation to pay until it is made.[5] And an ordinary subscription made without any designated time for payment, is generally held to become payable only after a formal declaration to that effect by the corporate authorities.[6]

[1] Phœnix Warehousing Co. *v.* Badger, 67 N. Y. 294.

[2] Breedlove *v.* Martinsville, etc., R. Co., 12 Ind. 114, where the subscription was payable in installments of ten per cent. every sixty days after the work was put under contract.

[3] Marsh *v.* Burroughs, 1 Woods 463; Poole, Jackson & Whyte's Case, L. R. 9 Ch. D. 322. Where the corporation owes money to the subscriber, it is frequently applied to discharge his indebtedness without awaiting a call. Adamson's Case, L. R. 18 Eq. Cas. 670.

[4] If it be merely a colorable payment to escape liability in case of insolvency he will not be permitted to claim a release from indebtedness on his subscription. Syke's Case, L. R. 13 Eq. Cas. 255; Barge's Case, L. R. 5 Eq. Cas. 420.

[5] Purton *v.* New Orleans, etc., R. Co., 3 La. Ann. 19. See, also, Williams *v.* Taylor, 120 N. Y. 244.

[6] Spangler *v.* Indiana, etc., R. Co., 21 Ill. 276; Braddock *v.* Philadelphia, etc., R. Co., 45 N. J. L. 363; Alabama, etc., R. Co. *v.* Rowley, 9 Fla. 508. A call is not applicable to stock which was subscribed for after the call was made. Pike *v.* Bangor, etc., R. Co., 68 Me. 445. Some cases in New York have asserted the rule that unless the contract provides for calls, the subscription is payable absolutely and at once. Lake Ontario, etc., R. Co. *v.* Mason, 16 N. Y. 451; Phœnix, etc., Co. *v.* Badger, 67 N. Y. 294. But the point was not decided in either of these cases and other cases in that state recognize the doctrine of the text. Mann *v.* Pentz, 3 N. Y. 415; Seymour *v.* Sturgess, 26 N. Y. 134; Williams *v.* Meyer, 41 Hun (N. Y.) 545. See, also, Williams *v.* Taylor, 120 N. Y. 244; South Georgia, etc., R. R. Co. *v.* Ayres, 56 Ga. 230. In a suit on a subscription to the capital stock of a company which provided that the subscriptions should be paid "in such installments and at such times as may be decided by a majority of the stockholders or board of directors, or a trustee empowered for the purpose by a majority of the stock-

§ 134. **Calls—Nature and effect of.**—Such a declaration as that referred to in the preceding section is termed a "call,"[1] and the sum of money so rendered payable may be payable in one or more installments, where the directors are invested with entire discretion and there is no contract to the contrary, according to the terms of the resolution.[2] Any declaration or resolution to the effect that the whole,[3] or a certain part,[4] of the unpaid subscriptions shall be paid in, though informal and irregular,[5] will be a valid call if it be sufficient to show a clear official intent to render payable so much of the subscription as is embraced by the terms,[6] and is susceptible of legal proof.[7] The resolution need not state the time or place of payment,[8] but these may be left to be fixed by the administrative officers

holders," no proof was offered to show that any provisions as to the amount of the installments or the time of payment of such had ever been so made, nor that any call for payment had ever been made in said manner, and it was held that there should be a judgment of non-suit against the plaintiff. North & S. S. R. Co. *v.* Spullock, 88 Ga. 283, 14 S. E. R. 478.

[1] Braddock *v.* Philadelphia, etc., R. Co., 45 N. J. L. 363; Newry and Enniskillen R. Co. *v.* Edmunds, 2 Ex. R. 118; Spangler *v.* Indiana, etc., R. Co., 21 Ill. 276; Pittsburgh, etc., R. Co. *v.* Clarke, 29 Pa. St. 146. The term may also refer to a notice given of such resolution, or to the time which it names as the time of payment. Ambergate, etc., R. Co. *v.* Mitchell, 4 Ex. R. 540.

[2] Northwestern, etc., R. Co. *v.* McMichael, 6 Ex. 273; Birkenhead, etc., R. Co. *v.* Webster, 6 Ex. 277; Hays *v.* Pittsburgh, etc., R. Co., 38 Pa. St. 81; Rutland, etc., R Co. *v.* Thrall, 35 Vt. 536; Haun *v.* Mulberry, etc., Road, 33 Ind. 103. But it is said that debt will not lie for one of such installments until all are due and payable. Birkenhead, etc., R. Co. *v.* Webster, *supra*.

[3] Fox *v.* Allensville, etc., R. Co., 46 Ind. 31; Haun *v.* Mulberry, etc., R. Co., 33 Ind. 103.

[4] Spangler *v.* Indiana, etc., R. Co., 21 Ill. 276; Ross *v.* Lafayette, etc., R. Co., 6 Ind. 297.

[5] Philadelphia, etc., R. Co. *v.* Hickman, 28 Pa. St. 318; Southampton Dock Co. *v.* Richards, 2 Eng. Railw. & Canal Cas. 215,234. Irregularities may be waived. Hays *v.* Pittsburgh, etc., R. Co.,38 Pa. St. 81; Macon, etc., R. Co. *v.* Vason, 57 Ga. 314. But see Grosse Isle Hotel Co. *v.* I' Anson, 43 N. J. L. 442.

[6] Budd *v.* Multnomah St. R. Co., 15 Ore. 413, s. c. 15 Pac. R. 659.

[7] An entry in the minutes of the corporation is sufficient proof. Fox *v.* Allensville, etc., Turnp. Co., 46 Ind. 31. The passage of the resolution may be proven though no entry was made in the minutes. Hays *v.* Pittsburgh, etc., R. Co., 38 Pa. St. 81; See Bavington *v.* Pittsburgh, etc., R. Co., 34 Pa. St. 358.

[8] Andrew *v.* Ohio, etc., R. Co., 14 Ind. 169; Great North, etc., R. Co. *v.* Biddulph, 7 M. & W. 243; Marsh *v.* Burroughs, 1 Woods (U. S.) 463; Rutland, etc., R. Co. *v.* Thrall, 35 Vt. 536.

of the corporation.[1] It is perfectly competent for the directors to determine these matters at the same or a subsequent meeting. And it has been held that they may order that at a certain future time a call payable at a later date shall be made.[2] Where no place is designated, the resolution requiring payment will import a requirement that the payments should be made to the treasurer of the corporation at his office.[3]

§ 135. **Directors may make calls—Delegation and ratification.**—In general, the directors are the proper authorities to make calls,[4] in the absence of any other provision in the charter, or in any statute or by-law. Where this power is not given to the directors, it is usually lodged with the stockholders at large,[5] in which case they may delegate the power to the directors ;[6] and it has been held in such a case that even without such a delegation of power, the directors may still make calls, if not expressly prohibited.[7] But the directors can not delegate such a special authority entrusted to them,[8] though they may ratify a call made by one to whom they have attempted to delegate it, and so render such call valid.[9] And they may, it seems, authorize another to determine the amount of some of the installments and to designate the times of payment.[10] Thus it is said that they may make a general declaration that the stock

[1] They should be fixed by the notice. Andrew *v.* Ohio, etc., R. Co., 14 Ind. 169; Cook on Stock and Stockholders, § 115. And should be reasonable. Fairfield Co. Turnp. Co. *v.* Thorp, 13 Conn. 173.

[2] Sheffield, etc., R. Co. *v.* Woodcock, 7 Mees. & W. 574. See, also, Penobscot R. R. Co. *v.* Dummer, 40 Me. 172, s. c. 63 Am. Dec. 654; Heaston *v.* Cincinnati, etc., R. R. Co., 16 Ind. 275, s.c. 79 Am. Dec. 430.

[3] Danbury, etc., R. Co. *v.* Wilson, 22 Conn. 435.

[4] Budd *v.* Multnomah St. R. Co., 15 Ore. 413, s. c. 15 Pac. Rep. 659, 3 Am. St. Rep. 169, 172; Ambergate, etc., R. Co. *v.* Mitchell, 4 Ex. Rep. 540.

[5] Cook on Stock and Stockholders, § 109.

[6] Rives *v.* Montgomery, etc., R. Co., 30 Ala. 92. *Contra*, *Ex parte* Winsor, 3 Story C. C. 411.

[7] Budd *v.* Multnomah St. R. Co., 15 Ore. 413. But see Marlborough, etc., Co. *v.* Smith, 2 Conn. 579.

[8] Rutland, etc., R. Co. *v.* Thrall, 35 Vt. 536; Silver Hook R. *v.* Greene, 12 R. I. 164; Pike *v.* Bangor, etc., R. Co., 68 Me. 445; Banet *v.* Alton, etc., R. Co., 13 Ill. 504.

[9] Rutland, etc., R. Co. *v.* Thrall, 35 Vt. 536; Read *v.* Memphis, etc., Co., 9 Heisk. (Tenn.) 545.

[10] Banet *v.* Alton, etc., R. Co., 13 Ill. 404.

is payable, and give a general authority to the treasurer to require the payment of the stock, and calls made by him will be valid, even though the resolutions do not specify the amount of each installment to be called for.[1]

§ 136. **Directors must act as a body—De facto board—Illegal calls.**—A valid call can not be made by a portion of the board of directors in the absence of a quorum for the transaction of business.[2] But that a *de facto* board was illegally elected can not be set up as a defense to a call regularly made by them.[3] If the corporation is unauthorized and illegal, calls made by it can not, it seems, be enforced.[4] But it is generally held that the implied promise to pay upon call contained in a subscription to the capital stock of a legally incorporated company is sufficient to support an action, and of course an action may be maintained on an express promise to pay for such stock.

§ 137. **Discretion of board in making calls.**—The corporate authorities who are empowered to make calls are the sole judges as to the advisability of making them,[5] subject, perhaps, to the condition that the power must be exercised in good faith for the purpose of raising money for the use of the corporation.[6]

[1] Hays *v.* Pittsburgh, etc., R. Co., 38 Pa. St. 81. But see Silver Hook Road *v.* Green, 12 R. I. 164.

[2] Price *v.* Grand Rapids, etc., R. Co., 13 Ind. 58; Bottomley's Case, L. R. 16 Ch. Div. 681. Possibly such an act could be confirmed by the majority. *Re* Phosphate of Lime Co., 24 L. T. 932.

[3] Eakright *v.* Logansport, etc., R. Co., 13 Ind. 404; Steinmetz *v.* Versailles, etc., R. Co., 57 Ind. 457; Fairfield, etc., Turnp. Co. *v.* Thorp, 13 Conn. 173; Macon, etc., R. Co. *v.* Vason, 57 Ga. 314. *Contra*, Howbeach, etc., Co. *v.* Teague, 5 H. & N. 151. And see People's Mut. Ins. Co. *v.* Westcott, 14 Gray (Mass.) 440, where a call by directors elected at a meeting without notice was held invalid. Moses *v.* Tompkins, (Ala.), 4 So. R. 763. The rule in England seems to be opposed to the doctrine stated in the text. Swansea Dock Co. *v.* Levien, 20 L. J. (Ex.) 447.

[4] Gillespie *v.* Ft. Wayne, etc., R. Co., 17 Ind. 243.

[5] Judah *v.* American, etc., Co., 4 Ind. 333; Budd *v.* Multnomah St. R. Co., 15 Ore. 413, s. c. 15 Pac. Rep. 659; Chouteau Ins. Co. *v.* Floyd, 74 Mo. 286; Oglesby *v.* Attrill, 105 U. S. 605.

[6] Harbershon's Case, L. R. 5 Eq. 286. But where the money is raised for the use of the company, equity will not inquire whether such use is essential to its best interests. Bailey *v.* Birkenhead, etc., R. Co., 12 Beav. 433; Yetts *v.* Norfolk, etc., R. Co., 3 De G. & Sm. 293. See, also, Oglesby *v.* Attrill, 105 U. S. 605.

And where no limitations are placed upon their discretion, they may require the whole subscription to be paid, either at one time or in installments.[1]

§ 138. **Charter and statutory limitations upon discretion—Periodical installments.** — The assessments are frequently required by charter or by statute[2] to be limited to not more than a certain per centum of the subscription within a given time. And where the charter provides that after the payment of a certain per cent., no further assessment shall be made, "unless with the assent of three-fourths of the stockholders," a shareholder can not be made to pay the balance by the directors, without a three-fourths vote of the stockholders.[3] It has also been held that subscriptions to stock which is to be called for in proportions can only be recovered where the installments were called for periodically, and that an attempt to make all the assessments at one time, without having given any notice to the subscriber that previous assessments were payable is invalid.[4] But where the subscription was made upon condition that not more than five per cent. should be assessed at any one time, it was held that an assessment of more than that sum, payable in installments of not more than five per cent. each, must be levied by a single vote of the directors.[5] The corporation can not, however, by contract, agree to postpone a call for an indefinite time.[6]

§ 139. **Call should affect all alike—Motive and expediency.**— A call in order to be valid must affect all similar stock of the corporation alike.[7] But the fact that wrong motives induced the directors to make the call does not constitute a valid objection to it,[8] where the assessment is equal and the money is raised

[1] Haun *v.* Mulberry, etc., Grav. R. Co., 33 Ind. 103.

[2] Stimson's Am. Stat. (1892), § 8601.

[3] Louisiana Paper Co. *v.* Waples, 3 Woods (U. S.)34.

[4] Spangler *v.* Indiana, etc., R. Co., 21 Ill. 276. But see Heaston *v.* Cincinnati, etc., R. R. Co., 16 Ind. 275, s. c. 79 Am. Dec. 430.

[5] Penobscot R. Co. *v.* Dummer, 40 Me. 172; Penobscot R. Co. *v.* Dunn, 39 Me. 587.

[6] McComb *v.* Credit Mobilier, etc., 13 Phil. Rep. 468; Van Allen *v.* Ill. Central R. Co., 7 Bosw. (N. Y.) 515.

[7] Pike *v.* Bangor, etc., R. Co., 68 Me. 445; Great Western, etc., Co. *v.* Burnham, 79 Wis. 47, s. c. 47 N. W. R. 373.

[8] Oglesby *v.* Attrill, 105 U. S. 605.

ostensibly for corporate uses. Thus, in the case cited, it was held that, although the declaration alleged that the assessment was unnecessary and was made in pursuance of a scheme to embarrass the plaintiff and get possession of his stock at a nominal price, as it did not appear to be in excess of the power of the directors nor for an object foreign to the purposes of the corporation, the court would not inquire into the motives which prompted it or the expediency of making it.

§ 140. Subscription payable upon demand — Notice. — The better rule seems to be that a subscription payable at such times and places as shall be directed by the directors of the company is payable upon demand,[1] that a suit to collect the installment called for is a sufficient demand,[2] and that no notice of such a call need be given before suit,[3] unless it is required by the charter or by-laws, or by statute.[4] In accordance

[1] Ross *v.* Lafayette, etc., R. Co., 6 Ind. 297; New Albany, etc., R. R. Co. *v.* McCormick, 10 Ind. 499, s. c. 71 Am. Dec. 337, and note; Gray *v.* Monongahela, etc., Co., 2 Watts & S. Pa. 156, s. c. 37 Am. Dec. 500, and note. But see 2 Thomp. Corp., §§ 1750, 1751, and English authorities there cited. The statutes of nearly all the states make the capital stock payable in such installments, and at such times and places as the directors prescribe. Stimson's Am. Stat. (1892), §§ 8112, 8601. But subject, in some states, to a restriction as to how much of the capital stock may be called for within a given time. Stimson's Am. Stat. (1892), §§ 8112, 8601, citing laws of Indiana, Neveda, Utah, New Mexico, Arizona, Pennsylvania, Montana. A call for the payment of a subscription is a sufficient acceptance of the subscriber as a stockholder. Danbury, etc., R. Co. *v.* Wilson, 22 Conn. 435; Wight *v.* Shelby R. Co., 16 B. Mon. (Ky.) 4; Buffalo, etc., R. Co. *v.* Dudley, 14 N. Y. 336.

[2] Smith *v.* Indiana, etc., R. Co., 12 Ind. 61.

[3] Wilson *v.* Wills Valley R. Co., 33 Ga. 466; Grubbs *v.* Vicksburg, etc., R. Co., 50 Ala. 398; Hill *v.* Nisbet, 100 Ind. 341; Grubb *v.* Mahoning Nav. Co., 14 Pa. St. 302; Lake Ontario, etc., R. Co. *v.* Mason, 16 N. Y. 451, 464; Peake *v.* Wabash R. Co., 18 Ill. 88.

[4] Notice is required by statute in several states. Stimson's Am. Stat. (1892), § 8112. The Pennsylvania R. R. act requires notice of calls to be given. McCarty *v.* Selinsgrove, etc., R. Co., 35 Leg. Intel. 410. See, also, Scarlett *v.* Academy, 43 Md. 203; Muskingum Valley, etc., Co. *v.* Ward, 13 Ohio 120, 2 Thomp. Corp., § 1756 (notice by publication). When the trustees of a corporation, suing on a subscription to its capital stock, show that they have taken steps, which the law authorized them to take, the presumption is that they have taken them regularly; and, if there is any by-law which renders their action irregular, it is matter of defense and should be

with this doctrine, where no such requirement is found in the charter or general laws, a judgment for an installment on a subscription will be sustained even though it does not appear that the defendant had any notice whatever of a call for such installment.[1] But respectable authority holds that notice of calls must be given before suit is brought to collect them,[2] since all stockholders can not reasonably be presumed to know what the directors do without notice of that fact,[3] which is peculiarly within the knowledge of the corporate authorities seeking to enforce the subscription liability.[4]

§ 141. **Requisites of notice.**—Where notice is required, it must be such a notice as will give the shareholder to understand that a call has been made, and that he is required to pay the amount on a named day,[5] and some authorities hold that it must designate the place of payment.[6] It must be given the full number of days prescribed before the call is made payable or before suit is brought,[7] but where actual personal notice is given this has been held effectual, although the charter, statute or by-laws provide for some other form of notice.[8] Actual notice

so pleaded. Puget Sound, etc., R. Co. *v.* Ouillette, 7 Wash. 265, 34 Pac. R. 929.

[1] Wilson *v.* Mills Valley R. Co., 33 Ga. 466.

[2] Wear *v.* Jacksonville, etc., R. Co., 24 Ill. 594; Rutland, etc., R. Co. *v.* Thrall, 35 Vt. 536; Edinburgh, etc., R. Co. *v.* Hebblewhite, 6 M. & W. 707; Miles *v.* Bough, 3 Ad. & El. (N. S.) 845; Lindley Comp. L. (5th ed.) 417.

[3] Hughes *v.* Antietam Mfg. Co., 34 Md. 316.

[4] This rule is commended by Cook in his work on Stock and Stockholders, § 118.

[5] Shackleford *v.* Dangerfield, L. R. 3 C. P. 407.

[6] Dexter, etc., R. Co. *v.* Millerd, 3 Mich. 91, holding that a notice to pay to the treasurer does not sufficiently indicate the place of payment. But see Muskingum Valley Turnp. Co. *v.* Ward, 13 Ohio 120, holding that it does. And see Danbury, etc., R. Co. *v.* Wilson, 22 Conn. 435, where it is held that a call is impliedly payable to the treasurer at his office unless otherwise provided in the resolution.

[7] Mississippi, etc., R. Co. *v.* Gaster, 20 Ark. 455. Fifty-nine days is insufficient where the statute prescribes sixty days. Macon, etc., R. Co. *v.* Vason, 57 Ga. 314.

[8] Mississippi etc., R. Co. *v.* Gaster, 20 Ark. 455, where the statute provided for sixty days' notice by publication. Schenectady, etc., R. Co. *v.* Thatcher, 11 N. Y. 102, where the defendant aided in sending out by mail notices required by charter. See, also, Lexington, etc., R. Co. *v.* Chandler, 13 Metc. (Mass.) 311. *Contra*, Tomlin *v.* Tonica, etc., R. Co., 23 Ill. 429 (374).

will be presumed where the subscriber expressly promises to pay a call which has already been made.[1] Notice by mail has been held to be effective only if actually received, in the absence of special provision for notice of this kind,[2] and it is for the jury to decide whether it was so received.[3]

§ 142. **Constructive notice.**—Where constructive notice is relied upon proof must be made of a strict compliance with the provisions of the statute, charter, or by-law conferring authority to give notice by publication or otherwise.[4] Publication must be made the full number of days required before the call is payable,[5] but one publication has been held sufficient unless more are expressly required.[6] It has been held that this mode of giving notice of matters in which many persons are interested, such as a call by the directors of a corporation, has so long been an universal usage, and of a notoriety equal to that of the publication of newspapers themselves, that the custom of doing so has become a part of the law of the land,[7] and that such a notice is sufficient where the mode of notice is left undetermined by express provision of law.[8] But the better authority seems to hold that such a notice would bind only those

[1] Miles *v.* Bough, 3 Ad. & El. (N. S.) 845; Fairfield Co. Turnp. Co. *v.* Thorp, 13 Conn. 173.

[2] Hughes *v.* Anteitam, etc., Co., 34 Md. 316. But see Braddock *v.* Philadelphia, etc., R. Co., 45 N. J. L. 363.

[3] Braddock *v.* Philadelphia, etc., R. Co., 45 N. J. Law 363. Only the person actually mailing the notice can testify that it was sent. Jones *v.* Sisson, 6 Gray (Mass.) 288.

[4] Macon, etc., R. Co. *v.* Vason, 57 Ga. 314; Cole *v.* Juliet, etc., Co., 79 Ill. 96; Louisville, etc., Turnpike Co. *v.* Meriwether, 5 B. Mon. (Ky.) 13.

[5] Macon, etc., R. Co. *v.* Vason, 57 Ga. 314. The certificate of the secretary is not admissible to prove such publication. Tomlin *v.* Tonica, etc., R. Co., 23 Ill. 429. The printed notice must be put in evidence. Rutland, etc., R. Co. *v.* Thrall, 35 Vt. 536. But may be supplemented by the testimony of the publisher as to subsequent insertions. Unthank *v.* Henry Co. Turnp. Co., 6 Ind. 125; Andrews *v.* Ohio, etc., R. Co., 14 Ind. 169.

[6] Muskingum Val. Turnp. Co. *v.* Ward, 13 Ohio 120; Fox *v.* Allensville, etc., Turnp. Co., 46 Ind. 31; Marsh *v.* Burroughs, 1 Woods (U. S.) 463.

[7] Hall *v.* United States Ins. Co., 5 Gill. (Md.) 484.

[8] Louisville, etc., Co. *v.* Meriwether, 5 B. Monr. (Ky.) 13; Danbury, etc., R. Co. *v.* Wilson, 22 Conn. 435; Grubbs *v.* Vicksburg, etc., R. R. Co., 50 Ala. 398. See, also, Fisher *v.* Evansville, etc., R. R. Co., 7 Ind. 407.

who could be proven to have actually read it;[1] and that, in general, showing that notice was given to others even of the immediate neighborhood will not be sufficient to charge a subscriber,[2] where constructive notice is not expressly provided for and such provisions carefully and exactly complied with.

§ 143. **Waiver by stockholder of notice and formalities of call—Estoppel.**—The subscriber may waive notice, or he may waive the formalities which give validity to the call,[3] and may even waive the call itself.[4] Such a waiver may be by acts as well as by express agreement.[5] It is held that a director participating in a call can not question its validity.[6] And a subscriber who, on receiving notice of a call, refuses to pay it and denies his liability as a stockholder, waives any further notice of future calls.[7] But voluntary payment of part of a subscription is not necessarily a waiver of the right to have calls made for the balance before payment.[8] And the payment of one illegal assessment does not estop the subscriber from setting up illegality as a defense to a second.[9]

§ 144. **Demand and suit for assessment.**—After a call is rendered payable by resolution and due notice, suit may be brought to collect it without further demand.[10] Where several installments

[1] Alabama, etc., R. Co. *v.* Rowley, 9 Fla. 508; Lake Ontario, etc., R. Co. *v.* Mason, 16 N. Y. 451. And see Lincoln *v.* Wright, 23 Pa. St. 76.

[2] New Jersey Midland R. Co. *v.* Strait, 35 N. J. L. 322.

[3] The vote of a city to pay a call is no waiver of its invalidity. Pike *v.* Bangor, etc., R. Co., 68 Me. 445. A waiver must be clearly proved. Rutland, etc., R. Co. *v.* Thrall, 35 Vt. 536.

[4] Such a waiver is frequently made by an agreement to pay the subscription on a day certain. New Albany, etc., R. Co. *v.* Pickens, 5 Ind. 247; Waukon, etc., R. Co. *v.* Dwyer, 49 Iowa 121.

[5] Macon, etc., R. Co. *v.* Vason, 57 Ga. 314.

[6] York Tramways Co. *v.* Willows, L. R. 8 Q. B. D. 685. But the fact that a director voted for a call and made a part payment of it, will not estop him to question his liability as a stockholder.

[7] Cass *v.* Pittsburg, etc., R. Co., 80 Pa. St. 31.

[8] Grosse Isle Hotel Co. *v.* Panson, 43 N. J. L. 442.

[9] Somerset, etc., R. Co. *v.* Cushing, 45 Me. 524. Nor, on the other hand, does the illegality of one assessment vitiate a subsequent legal assessment. European, etc., R. R. Co. *v.* McLeod, 3 Pugsley (16 N. B.) 3, 39.

[10] Winter *v.* Muscogee, etc., R. Co., 11 Ga. 438; Penobscot R. Co. *v.* Dummer, 40 Me. 172.

are in default, one suit may be brought for all.[1] The complaint in such a case must aver that all the several installments are due and payable.[2] Interest may be collected from the time the installments become due, in case they are not promptly paid.[3]

§ 145. **Assignment of right to collect subscription or assessment.**—The claim arising from an unpaid call may be assigned like any other debt,[4] as may subscription contracts payable upon a day certain.[5] But subscriptions made subject to call can not be mortgaged or sold before payment has been called for,[6] since the discretion to make calls vested in the directors is not the subject of transfer,[7] and, generally, the power to enforce calls can only be exercised by the company to whose stock the subscription was made, unless there has been a consolidation or transfer of the franchises to another company in pursuance of full statutory authority.[8]

§ 146. **When courts may compel call and payment.**—In case of corporate insolvency, a court of equity may compel the directors to make a call for the purpose of raising funds with which to pay the debts of the corporation.[9] Or it may dispense with a call and order that the unpaid subscriptions, or such

[1] Spangler *v.* Indiana, etc., R. Co., 21 Ill. 276.

[2] Bethel, etc., Turnp. Co. *v.* Bean, 58 Me. 89.

[3] Gould *v.* Oneonta, 71 N. Y. 298; Casey *v.* Galli, 94 U. S. 673; Rikhoff *v.* Brown's, etc., Co., 68 Ind. 388. This, however, is a matter frequently regulated by statute. Thus, under the Virginia statute, it has been held interest may be collected from the date of the call. Hawkins *v.* Glenn, 131 U. S. 319, s. c. 9 Sup. Ct. Rep. 739.

[4] Miller *v.* Malony, 3 B. Mon. (Ky.) 105; Wells *v.* Rodgers, 50 Mich. 294; Downie *v.* Hoover, 12 Wis. 174; Morris *v.* Cheney, 51 Ill. 451.

[5] See Smith *v.* Hollett, 34 Ind. 519; Hays *v.* Branham, 36 Ind. 219.

[6] *Ex parte* Stanley, 33 L. J. (Ch.) 535; N. J. Midland R. Co. *v.* Strait, 35 N. J. L. 322; Wells *v.* Rodgers, 50 Mich. 294, s. c. *sub. nom.* Rodgers *v.* Wells, 44 Mich. 411.

[7] A mortgage on all the land, property and effects of the corporation does not cover unpaid subscriptions. Pickering *v.* Ilfracombe R. Co., 37 L. J. (C. P.) 118.

[8] Thrasher *v.* Pike County R. Co., 25 Ill. 393.

[9] Germantown Pass. R. Co. *v.* Fitler, 60 Pa. St. 124; Sanger *v.* Upton, 91 U. S. 56; Chandler *v.* Siddle, 3 Dill. (U. S.) 477. But this remedy has been disapproved. Dalton, etc., R. Co. *v.* McDaniel, 56 Ga. 191; Hatch *v.* Dana, 101 U. S. 205; Ward *v.* Griswoldville, etc., Co., 16 Conn. 593. Compare Glenn *v.* Howard, 81 Ga. 383, s. c. 8 S. E. R. 636. See, also, Great Western Tel. Co. *v.* Purdy, 162 U. S. 329, 16 Sup. Ct. R. 810.

a part of them as may be necessary to pay the corporate debts,[1] be paid to a receiver for the benefit of the corporate creditors.[2] The right of the court to do this is upheld even where the statute provides that calls shall be made only by the directors.[3]

§ 147. **Extent of stockholder's liability for assessments—Agreements as affecting liability.**—The principle of law is now well settled that a stockholder is not liable for assessments beyond the par value of his stock,[4] unless made so liable by provisions of the corporate charter or by a constitutional statute.[5] Liability to such an assessment can not be created by a by-law adopted by a majority vote of the directors or of the stockholders.[6] It has been held, however, that an agreement entered into by all the stockholders and printed upon the certificates, may make not only the stockholders but their assignees liable to further assessments.[7] And if the stockholders, by agreement among themselves, voluntarily contribute to the corporate treasury in proportion to the value of their shares to meet the needs of the corporation, such advances do not create corporate debts and can not be recovered back.[8]

[1] Citizens', etc., Co. *v.* Gillespie, 115 Pa. St. 564. See, also, Bank *v.* Butchers', etc., Bank, 107 Mo. 133, s. c. 17 S. W. R. 644, 28 Am. St. R. 405.

[2] Scovill *v.* Thayer, 105 U. S. 143; Hatch *v.* Dana, 101 U. S. 205; Marsh *v.* Burroughs, 1 Woods (U. S.) 463; Henry *v.* Vermillion, etc., R. Co., 17 Ohio 187; Glenn *v.* Sample, 80 Ala. 159; Chandler *v.* Keith, 42 Iowa 99; Shockley *v.* Fisher, 75 Mo. 498; Adler *v.* Milwaukee, etc., Co., 13 Wis. 57; Glenn *v.* Saxton, 68 Cal. 353; Sagory *v.* Dubois, 3 Sandf. Ch. 466; Elderkin *v.* Peterson, 8 Wash. 674.

[3] Glenn *v.* Saxton, 68 Cal. 353; Crawford *v.* Rohrer, 59 Md. 599. But see Trustees, etc., *v.* Waples, 3 Woods (U. S.) 34, holding that the court can not make a call where the charter provides for a call only upon a three-fourths vote of the stockholders.

[4] Lewey's Island R. Co. *v.* Bolton, 48 Me. 451; Great Falls, etc., R. Co. *v.* Copp, 38 N. H. 124; Smith *v.* Huckabee, 53 Ala. 191; Chase *v.* Lord, 77 N. Y. 1; Coffin *v.* Rich, 45 Me. 507; Inhabitants of Norton *v.* Hodges, 100 Mass. 241; Carr *v.* Iglehart, 3 Ohio St. 457.

[5] Santa Cruz R. Co. *v.* Spreckles, 65 Cal. 193. See *post* Chapter ix, Stockholders.

[6] Kennebec, etc., R. Co. *v.* Kendall, 31 Me. 470; Trustees of Free Schools *v.* Flint, 13 Metc. 539; Flint *v.* Pierce, 99 Mass. 68. But see Hume *v.* Winyah Canal Co., Carolina L. J. vol. 1, 217, cited in Cook on Stock, etc., § 242.

[7] Weeks *v.* Silver, etc., Co., 23 J. and S. (N. Y. Super. Ct.) 1.

[8] Bidwell *v.* Pittsburgh, etc., R. Co., 114 Pa. 535, s. c. 6 Atl. Rep. 729.

§ 148. **Construction of charter and statutory provisions regarding assessments.**—Statutes and charter provisions authorizing such assessments will be strictly construed.[1] Where the charter provided "that the shares in said capital stock shall not be liable to assessment after the capital stock so fixed in amount has been paid in, except in equal proportions, and by the consent of the stockholders owning at least three-fourths of the shares of the capital stock of the corporation," it was held that paid-up stock was not liable to assessment in any event until the full amount of the capital stock as fixed by the charter had been subscribed for and actually paid in.[2] So, where the charter provided that "if at any time the stock paid into said corporation shall be impaired by loss or otherwise, the directors shall forthwith repair the same by assessment," this authority was held to be conferred only for the purpose of providing capital with which to continue business, and a receiver was not allowed to make an assessment with which to pay debts.[3]

§ 149. **Remedies where stockholder fails to pay subscription or assessment—Forfeiture.**—A subscriber may ordinarily be sued for any unpaid installment due on his stock, as for the breach of any other contract to pay money,[4] his subscription

[1] Libby *v.* Tobey, 82 Me. 397; O'Reilly *v.* Bard, 105 Pa. St. 569.

[2] Atlantic De Laine Co. *v.* Mason, 5 R. I. 463.

[3] Dewey *v.* St. Albans Trust Co., 57 Vt. 332. But a similar statute in California (Civ. Code, §§ 331, 332) is construed to permit assessments to any extent "for the purpose of paying expenses, conducting business or paying debts." Santa Cruz R. Co. *v.* Spreckles, 65 Cal. 193.

[4] The corporation may levy execution on the stock and sell it to satisfy a judgment obtained in such suit. Chase *v.* East Tenn., etc., R. Co., 5 Lea (Tenn.) 415. In most of the New England States, however, the rule is that the only remedy open to a corporation in case of the non-payment of stock subscribed is by forfeiture of the shares, unless the subscriber expressly promised to pay, or the charter expressly bound him to do so. Katama Land Co. *v.* Jernegan, 126 Mass. 155; Piscataqua Ferry Co. *v.* Jones, 39 N. H. 491; N. H. Central R. Co. *v.* Johnson, 30 N. H. 390; Belfast, etc., R. Co. *v.* Cottrell, 66 Me. 185; Connecticut, etc., R. Co. *v.* Bailey, 24 Vt. 465. *Contra*, Windsor Electric Light Co. *v.* Tandy, 66 Vt. 248, 29 Atl. R. 248; Cook on Stock and Stockholders, § 71, and numerous authorities cited. But in Connecticut it is held that the signing of a sub-

to the capital stock being construed as a promise to pay the face value of the shares subscribed for.[1] But the corporation is also, in many of the states, authorized by statute to declare a forfeiture of its stock for non-payment of calls.[2] While others authorize a sale of the stock and an application of the proceeds to the payment of the installment, for which a call has been issued and to which the owner does not respond, after due notice.[3] This remedy can not be pursued except when it is given by charter or by statute,[4] or is created by consent of

scription paper and agreeing to "take" certain shares amounts to a promise to pay their face value. Hartford, etc., R. Co. *v.* Kennedy, 12 Conn. 499. And this is the general rule throughout the United States and is the rule enforced in the federal court. Upton *v.* Tribilcock, 91 U. S. 45; Sanger *v.* Upton, 91 U. S. 56, and cases cited in next note *infra*. A provision in the charter that the subscription may be enforced by suit or by forfeiture will fix a personal liability upon the subscriber without an express promise to pay. Kennebec, etc., R. Co. *v.* Kendall, 31 Me. 470; Connecticut, etc., R. Co. *v.* Bailey, 24 Vt. 465. See Fry *v.* Lexington, etc., R. Co., 2 Met. (Ky.) 314. Pennsylvania, Nebraska, Maryland, Michigan, Wisconsin, Alabama, New Mexico and Arizona have general statutes providing that a railroad corporation may sue for unpaid installments. Stimson's Am. Stat. (1892), § 8602. Similar provision is made by statute in the following states: Ohio R. S., 1890, § 3253; Minn. Gen. Stat., 1891, § 3131; W. Va. Code, 1887, Ch. 53, § 28; Ark. Dig., 1884, § 970; Colo. Gen. Stat., 1883, § 241. An agreement to take and fill certain shares has been construed to be an agreement to pay for them. Buckfield Branch R. Co. *v.* Irish, 39 Me. 44. See, also, Penobscot, etc., R. Co. *v.* Bartlett, 12 Gray (Mass.) 244.

[1] Northern R. Co. *v.* Miller, 10 Barb. (N. Y.) 260; Kirksey *v.* Florida, etc., Plank R. Co., 7 Fla. 23; Instone *v.* Frankfort Bridge Co., 2 Bibb. (Ky.) 576; Hartford, etc., R. Co. *v.* Kennedy, 12 Conn. 499; Hughes *v.* Antietam M. Co., 34 Md. 316; Selma R. Co. *v.* Tipton, 5 Ala. 787; Western R. Co. *v.* Avery, 64 N. C. 491; Klein *v.* Alton, etc., R. Co., 13 Ill. 514; N. E. R. R. Co. *v.* Rodriguez, 10 Rich. L. (S. C.) 278; Stokes *v.* Lebanon, etc., Turnp. Co., 6 Humph. (Tenn.) 241; Freeman *v.* Winchester, 10 S. & M. (Miss.) 577; Delaware, etc., Canal Nav. *v.* Sansom, 1 Binn. (Pa.) 70; Windsor El. Light Co. *v.* Tandy, 66 Vt. 248, 29 Atl. R. 248. But an action on a stock assessment against one party on stock which is in the name of another party on the books of the corporation can not ordinarily be maintained by the corporation. Vale Mills *v.* Spalding, 62 N. H. 605.

[2] Stimson's Am. Stat. (1892), § 8113.

[3] Stimson's Am. Stat. (1892), § 8113.

[4] Westcott *v.* Minnesota, etc., Co., 23 Mich. 145; Budd *v.* Multnomah St. R. Co., 15 Ore. 413, s. c. 3 Am. St. R. 169; Budd *v.* Multnomah, 15 Ore. 404, s. c. 40 Am. & Eng. R. R. Cas. 551; Barton's Case, 4 DeG. & J. 46; Perrin *v.* Granger, 30 Vt. 595; Minnehaha, etc., Ass'n *v.* Legg, 50 Minn. 333, 52 N. W. R. 898.

all the stockholders which is usually indorsed on the certificates.[1]

§ 150. **Cumulative remedies—Election.**—Statutory permission to declare a forfeiture does not destroy the corporate right to collect the money due upon the subscription by other means, where such right is given by law or by contract,[2] and the corporation may elect which remedy it will pursue.[3] It has been held that the remedy for forfeiture and sale could be pursued, and that the shareholder could then be sued for any unpaid balance not discharged by the proceeds arising from a sale of the stock, as in a foreclosure of a mortgage, where the mort-

[1] Weeks *v.* Silver, etc., Co., 23 J. & S. (N. Y.) 1; Lesseps *v.* Architects Co., 4 La. Ann. 316. It can not be created by a by-law, except where authority to make such by-law is conferred by statute, and a sale under an attempted forfeiture without such authority conveys no title. Matter of Long Island R. Co., 19 Wend. (N.Y.) 37, s. c. 32 Am. Dec. 429. See Kirk *v.* Nowill, 1 Term. R. 118; Kennebec, etc., R. Co. *v.* Kendall, 31 Me. 470. And compare Detweiler *v.* Breckenkamp, 83 Mo. 45; Lesseps *v.* Architects Co., 4 La. Ann. 316.

[2] Atlantic Dynamite Co. *v.* Andrews, 97 Mich. 466; Puget Sound, etc., R. Co. *v.* Ouillette, 7 Wash. 265; Ogdensburg, etc., R. Co. *v.* Frost, 21 Barb. (N. Y.) 541; Rensselaer, etc., R. Co. *v.* Wetsel, 21 Barb. (N. Y.) 56; Delaware, etc., Co. *v.* Sansom, 1 Binn. (Pa.) 70; Hartford, etc., R. Co. *v.* Kennedy, 12 Conn. 499; Rutland, etc., R. Co. *v.* Thrall, 35 Vt. 536; White Mountain R. Co. *v.* Eastman, 34 N. H. 124; Hightower *v.* Thornton, 8 Ga. 486, 502; Selma, etc., R. Co. *v.* Tipton, 5 Ala. 787; Gratz *v.* Redd, 4 B. Mon. (Ky.) 178; Boston, etc., R. Co. *v.* Wellington, 113 Mass. 79; New Orleans, etc., Co. *v.* Briggs, 27 La. Ann. 318; Peoria, etc., R. Co. *v.* Elting, 17 Ill. 429; Greenville, etc., R. Co. *v.* Cathcart, 4 Rich. L. (S. C.) 89; Stokes *v.* Lebanon, etc., Co., 6 Humph. (Tenn.) 241; Kirksey *v.* Florida, etc., Co., 7 Fla. 23; Tar River, etc., Co. *v.* Neal, 3 Hawks. (N. C.) 520; South Bay, etc., Co. *v.* Gray, 30 Me. 547. The liability of a stockholder in a foreign corporation is generally determined by the law of the state which created it, but it may be enforced by the courts of other jurisdictions, and "the general rule in the states of this country is, where a corporation has a right under the statute creating it, to declare a forfeiture of shares for nonpayment of calls, it may exercise its option to forfeit the stock or bring its action to collect the amount of the calls, but can not forfeit the stock and afterwards sue at law, as the exercise of the first option would end the relation of the parties and exclude a resort to the other." Mandel *v.* Swan Land, etc., Co., 154 Ill. 177, s. c. 27 L. R. A. 313, citing Small *v.* Herkimer, etc., Co., 2 N. Y. 330; Buffalo, etc., R. Co. *v.* Dudley, 14 N. Y. 336; Rutland, etc., R. Co. *v.* Thrall, 35 Vt. 536.

[3] 1 Cook on Stock and Stockholders, § 124.

gaged property does not sell for enough to pay the debt.[1] It is argued that where provision is made for the payment to the subscriber of any surplus arising from a sale, after paying the delinquent assessment[2] the contention that the forfeiture destroys the contract relation between him and the corporation can not be upheld, but he will be impliedly liable for any deficiency in the sum necessary to discharge such assessment.[3] And it has been held that the company may declare a forfeiture after suit brought to recover unpaid calls, and that such a forfeiture can not be pleaded in bar of the further maintenance of the suit where the value of the stock forfeited is not equal to the money due the company[4] although the stockholder may insist, in diminution of damages, that such value shall be subtracted from the sum for which the corporation would otherwise have judgment.[5] But it is generally held that while the corporation may proceed either by suit or by forfeiture, the adoption of the statutory remedy by forfeiture or sale excludes the other,[6] except where the statute gives an action for the balance of the subscription not canceled by the proceeds of the

[1] Carson *v.* Arctic Min. Co., 5 Mich. 288. But see Mandel *v.* Swan, etc., Co., 154 Ill. 177, s. c. 27 L. R. A. 313. For other cases in which legislative provision is made by charter or otherwise, for such procedure see Brockenbrough *v.* James River, etc., Co., 1 Patton & H. (Va.) 94; Mann *v.* Cooke, 20 Conn. 178; Danbury, etc., R. Co. *v.* Wilson, 22 Conn. 435. One who acquired his shares by transfer is held liable under this rule equally with an original subscriber. Merrimac Min. Co. *v.* Bagley, 14 Mich. 501, and cases cited *supra*.

[2] Provision that the shareholder shall have the surplus or be liable for any deficiency is found in the general statutes of Massachusetts, Vermont, Maryland and Wisconsin. Stimson's Am. Stat. (1892), § 8602.

[3] Carson *v.* Arctic Min. Co., 5 Mich. 288. See, also, Great Northern R. Co. *v.* Kennedy, 4 Exch. 417; Hartford, etc., R. Co. *v.* Kennedy, 12 Conn. 499.

[4] Herkimer Mfg. Co. *v.* Small, 21 Wend. (N. Y.) 273, reversed, however, in 2 N. Y. 330.

[5] Herkimer Mfg. Co. *v.* Small, 21 Wend. (N. Y.) 273.

[6] Ogdensburg, etc., R. Co. *v.* Frost, 21 Barb. (N. Y.) 541; Mills *v.* Stewart, 41 N. Y. 384; Athol, etc., R. Co. *v.* Inhabitants of Prescott, 110 Mass. 213; Mechanics', etc., Co. *v.* Hall, 121 Mass. 272; Allen *v.* Montgomery, etc., Co., 11 Ala. 437; Macauly *v.* Robinson, 18 La. Ann. 619; Rutland, etc., R. Co. *v.* Thrall, 35 Vt. 536; Macon, etc., R. Co. *v.* Vason, 57 Ga. 314; Ashton *v.* Burbank, 2 Dill. (U. S.) 435; King's Case, L. R. 2 Ch. 714; Mandel *v.* Swan, etc., Co., 154 Ill. 177, s. c. 27 L.R. A. 313, and note.

sale.[1] Where such an action was given by statute in Massachusetts it was held that a personal action could not be maintained until there had been a formal declaration of forfeiture and a sale based upon such forfeiture.[2] But a mere threat to enforce a forfeiture, or an unsuccessful attempt to sell the shares will not bar a suit to enforce the subscription contract.[3] Notice that a forfeiture will be enforced in the future unless payment is made is not a forfeiture[4] nor is a threat of forfeiture for non-payment.[5] And a stockholder's obligation to pay continues so long as his right to the shares, with the privileges and emoluments attached to them, remains.[6] It has also been held that an action to collect a subscription, when prosecuted to judgment, will preclude the enforcement of a forfeiture.[7] The remedy in such a case would seem to be by execution levied upon the stock.[8]

§ 151. **Effect of forfeiture.**—Except where the statute makes provision for the payment to the shareholder of the surplus arising from a sale of the forfeited shares after payment of the installments due,[9] it is held that such surplus belongs to the

[1] Such a provision is frequently found in special charters granted to corporations. See New Hampshire Cent. R. Co. *v.* Johnson, 30 N. H. 390; Danbury, etc., R. Co. *v.* Wilson, 22 Conn. 435; Great Northern R. Co. *v.* Kennedy, 4 Exch. 417, 425. It is also given by general statute in Massachusetts, Vermont, Maryland and Wisconsin. Stimson's Am. Stat. (1892), § 8602. And in West Virginia and Arkansas, R. S. W. Va. (1887) Ch. 53, § 27, R. S. Ark. (1884), § 970.

[2] Athol, etc., R. Co. *v.* Prescott, 110 Mass. 213. But the holding would probably be different in those states where a personal action is given in the first instance by the common law, as construed by their courts.

[3] Macon, etc., R. Co. *v.* Vason, 57 Ga. 314; Instone *v.* Frankfort Bridge Co., 2 Bibb. (Ky.) 576. See Water Valley M. Co. *v.* Seaman, 53 Miss. 655; Cockerell *v.* Van Diemen's Land Co., 26 L. J. (C. P.) 203.

[4] Macon, etc., R. Co. *v.* Vason, 57 Ga. 314; Bigg's Case, L. R. 1 Eq. 309; Hays *v.* Franklin County Lumber Co., 35 Neb. 511. See, also, Johnson *v.* Albany, etc., R. Co., 40 How. Pr. (N. Y.) 193.

[5] Water Valley M. Co. *v.* Seaman, 53 Miss. 655.

[6] Instone *v.* Frankfort Bridge Co., 2 Bibb. (Ky.) 576, 581; Buffalo, etc., R. Co. *v.* Dudley, 14 N. Y. 336, 347.

[7] Giles *v.* Hutt, 3 Ex. 18.

[8] For an instance of the sale of stock on such an execution, see Chase *v.* East Tenn., etc., R. Co., 5 Lea (Tenn.) 415.

[9] The statutes of Massachusetts, Ver-

corporation.[1] After forfeiture, the stockholder can claim none of the rights of an owner of stock,[2] nor can he be charged as a stockholder, with the corporate liabilities at the suit of the corporate creditors,[3] even for debts contracted before the forfeiture.[4] But to have this effect, the forfeiture must be enforced in good faith. A forfeiture of shares by collusion of the shareholder and the directors will be set aside for fraud by a court of equity at the suit of the creditors of an insolvent corporation,[5] and the shareholder will be held liable to the same extent as if no forfeiture had been attempted.[6]

§ 152. **Statutory method of forfeiture must be pursued.**— The method of forfeiture prescribed by the statute authorizing this remedy must be strictly pursued, and all the prescribed formalities complied with,[7] in order to divest the stockholder's

mont, Maryland and Wisconsin make such provision. Stimson's Am. Stat. (1892), § 8602.

[1] Small *v.* Herkimer, etc., Co., 2 N. Y. 330. See Freeman *v.* Harwood, 49 Me. 195; Cook on Stock and Stockholders, § 133.

[2] St. Louis, etc., Co. *v.* Sandoval, etc., Co., 116 Ill. 170.

[3] Allen *v.* Montgomery R. Co., 11 Ala. 437, 450; Macauly *v.* Robinson, 18 La. Ann. 619; Snell's Case, L. R. 5 Chan. 22.

[4] Mills *v.* Stewart, 41 N. Y. 384 (unless it is collusive and fraudulent).

[5] Germantown, etc., R. Co. *v.* Fitler, 60 Pa. St. 124.

[6] Burke *v.* Smith, 16 Wall. (U. S.) 390; Slee *v.* Bloom, 19 Johns. (N. Y.) 456; Gower's Case, L. R. 6 Eq. 77; Stanhope's Case, L. R. 1 Ch. 161. Abandonment of the shares by the stockholder, without a declaration of forfeiture by the corporation will not release the subscriber from liability on his subscription. Rockville, etc., Turnp. Co. *v.* Maxwell, 2 Cranch C. C. (U. S.) 451.

[7] Germantown, etc., R. Co. *v.* Fitler, 60 Pa. St. 124; Portland, etc., R. Co. *v.* Graham, 11 Metc. (Mass.) 1; York, etc., R. R. Co. *v.* Ritchie, 40 Me. 425; Lewey's Island R. Co. *v.* Bolton, 48 Me. 451, s. c. 77 Am. Dec. 236; Eastern, etc., P. R. Co. *v.* Vaughan, 20 Barb. (N. Y.) 155; Johnson *v.* Albany, etc., R. R. Co., 40 How. Pr. (N. Y.) 193; Downing *v.* Potts, 23 N. J. Law 66; Occidental, etc., Assoc. *v.* Sullivan, 62 Cal. 394; London, etc., R. Co. *v.* Fairclough, 2 Mann. & G. 674; Garden Gully, etc., Co. *v.* McLister, L. R. 1 App. Cas. 39; Moses *v.* Tompkins, 84 Ala. 613; Alabama, etc., R. R. Co. *v.* Rowley, 9 Fla. 508; Morris *v.* Metalline Land Co., 164 Pa. St. 326, s. c. 27 L. R. A. 305, and note. See Rutland, etc., R. Co. *v.* Thrall, 35 Vt. 536. Some of the old cases hold that a substantial compliance with the requirements is sufficient, but the modern rule is as stated in the text. Cook on Stock and Stockholders, § 129. But neglect to comply strictly with a matter of mere form rather than of substance will not necessarily invalidate a forfeiture.

title. Where, as is true in many of the states,[1] the statute authorizes a sale of the forfeited shares at public auction, they can not legally be sold at private sale.[2] And a sale for the payment of several assessments, including one which was illegal or unauthorized, may be avoided.[3] Only a properly constituted board of directors has authority to declare a forfeiture,[4] and the stockholder may enjoin an attempted forfeiture of his shares by a board that has not been legally chosen.[5] The company may defer the exercise of its power of forfeiture until all of the installments become due,[6] but if it elects to sell stock that is only partially paid for by payment of the delinquent assessment, the purchaser at the forfeiture sale must assume the payment of the installments to become due in the future; and if he fails to pay them the stock must be sold again.[7] And where the statute is silent as to details, the procedure must be just and reasonable.[8]

In re North Hallenbeagle Min. Co., Knight's Case, L. R. 2 Chan. 321, s. c. 15 L. T. (N. S.) 546.

[1] Stimson's Am. Stat. (1892), § 8113. Several of these states permit other modes of sale to be prescribed by by-laws. Stimson's Am. Stat. (1892), § 8113.

[2] Lewey's Island R. Co. *v.* Bolton, 48 Me. 451. See Birmingham, etc., R. Co. *v.* Locke, 1 Q. B. 256; Catchpole *v.* Ambergate, etc., R. Co., 1 Ellis & B. 111, as to what is a sufficient compliance with prescribed formalities.

[3] Stoneham, etc., R. Co. *v.* Gould, 2 Gray, (Mass.) 277; Lewey's Island R. R. Co. *v.* Bolton, 48 Me. 451.

[4] Garden Gully, etc., Co. *v.* McLister, L. R. 1 App. Cas. 39, 55. See, also, Ormsby *v.* Vermont, etc., Co., 56 N. Y. 623; Bottomley's Case, L. R. 16 Ch. Div. 681.

[5] Moses *v.* Tompkins, 84 Ala. 613, 4 So. R. 763.

[6] Brockenbrough *v.* James River, etc., Co., 1 Patton & H. (Va.) 94.

[7] Sturges *v.* Stetson, 1 Biss. (U. S.) 246, 251.

[8] Rutland, etc., R. Co. *v.* Thrall, 35 Vt. 536, holding that a resolution of the board of directors that all stock remaining unpaid at a day named in the future shall be sold to satisfy the assessment levied, is reasonable. But see Johnson *v.* Albany, etc., R. Co., 40 How. Prac. (N. Y.) 193, to the effect that a general resolution to forfeit all stock remaining unpaid at a certain day in the future is insufficient to effect a forfeiture without further action by the corporation. But where the stockholder is shown to have received notice of such determination, it is held that the court will presume that the necessary steps were taken to perfect the forfeiture. Knight's Case, L. R. 2 Ch. 321, s. c. 15 L. T. (N. S.) 546. A thirty days' notice is reasonable and sufficient. Rutland, etc., R. Co. *v.* Thrall, 35 Vt. 536. But a three days' notice is not; at least, where the owner lives at a distance in another state. Lexington, etc., R. Co. *v.* Staples, 5 Gray (Mass.) 520.

§ 153. **Notice of forfeiture.**—Notice to the delinquent subscriber that his shares will be forfeited unless calls are paid within a certain time is generally required to precede the enforcement of the forfeiture,[1] and this requirement must be strictly complied with.[2] While the manner of giving notice is usually prescribed by the statute authorizing a forfeiture, personal notice is said to be sufficient.[3] And it is intimated that one having actual notice can not object to the mode by which it is given.[4] But a notice which did not purport to be given by the proper officer of the company has been held insufficient, and the sale based thereon was held voidable.[5] The notice must certain and unequivocal as to the time of forfeiture,[6] and time and place of sale.[7]

[1] For the general statutes of thirty of the states containing this requirement, see Stimson's Am. Stat. (1892), § 8113. But, under the Indiana statute, after notice of the call is given, one who fails to pay can not insist that an additional notice of forfeiture should be given. Hill *v.* Nisbet, 100 Ind. 341.

[2] Lewey's Island R. Co. *v.* Bolton, 48 Me. 451; Lake Ontario, etc., R. Co. *v.* Mason, 16 N. Y. 451; Morris *v.* Metalline, etc. Co., 164 Pa. St. 326, 31 Atl. Rep. 114; Rutland, etc., R. Co. *v.* Thrall, 35 Vt. 536, 546; Hughes *v.* Antietam, etc., Ry. Co., 34 Md. 316; Heaston *v.* Cincinnati, etc., R. R. Co., 16 Ind. 275. See, also, Eppes *v.* Mississippi, etc., R. Co., 35 Ala. 33; Cockrell *v.* Van Dieman's Land Co., 26 L. J. (C. P.) 203; Lexington, etc., R. Co. *v.* Chandler, 13 Metc. (Mass.) 311, where a notice required by a by-law was held merely directory. Knight's Case, L. R. 2 Ch. 321, s. c. 15 L. T. (N. S.) 546. But a notice *after* forfeiture was presumed to have been given, when the substantial requirements were complied with. Where notice of an assessment must be given thirty days before the order of the directors to sell the shares, it is not sufficient to give the notice thirty days before the sale. Lewey's Island R. Co. *v.* Bolton, 48 Me. 451. See Louisville, etc., Turnp. Co. *v.* Meriwether, 5 B. Mon. (Ky.) 13.

[3] Mississippi, etc., R. Co. *v.* Gaster, 20 Ark. 455; Lexington, etc., R. Co. *v.* Chandler, 13 Metc. (Mass.) 311. See Knight's Case, L. R. 2 Chan. 321, s. c. 15 L. T. R. 546; Birmingham, etc., R. Co. *v.* Locke, 1 Q. B. 256; South Staffordshire R. Co. *v.* Burnside, 5 Exch. 129. But see Lewey's Island R. Co. *v.* Bolton, 48 Me. 451.

[4] Mississippi, etc., R. Co. *v.* Gaster, 20 Ark. 455; Lexington, etc., R. Co. *v.* Chandler, 13 Metc. (Mass.) 311.

[5] Portland, etc., R. Co. *v.* Graham, 11 Met. 1. See, also, Lewey's Island R. Co. *v.* Bolton, 48 Me. 441, s. c. 77 Am. Dec. 236. It should usually be served upon the person who is registered as owner. Graham *v.* Van Dieman's Land Co., 1 Hurlst & N. 541, s. c. 26 L. J. Ech. 73.

[6] Watson *v.* Eales, 23 Beav. 294.

[7] Lexington, etc., R. Co. *v.* Staples, 5 Gray (Mass.) 520.

§ 154. **Defeating and annulling forfeiture—Estoppel.**—The forfeiture can be defeated by a tender of the full amount due on the subscription to the proper officer of the corporation at any time before a sale actually takes place.[1] An irregular or defective forfeiture is voidable only, and not void, and long acquiescence [2] may estop both the shareholder and the company from denying its validity.[3] But the share-owner may, in a proper case, by calling upon a court of chancery, obtain a decree annulling such a forfeiture;[4] and so, too, may corporate

[1] Mitchell *v.* Vermont, etc., Co., 67 N. Y. 280. This is true though the tender be accompanied by a protest. Sweny *v.* Smith, L. R. 7 Eq. 324. And, it would seem, even though a declaration of strict forfeiture had been entered on the books of the company. Walker *v.* Ogden, 1 Biss. (U. S. C. C.) 287. See, also, Iron R. R. Co. *v.* Fink, 41 Ohio St. 321, s. c. 52 Am. R. 84. The owner has been allowed to redeem in several cases involving peculiar circumstances. See, Stubbs *v.* Lister, 1 Younge & C. Ch. Cas. 81; Walker *v.* Ogden, 1 Biss. (U. S.) 287.

[2] Phosphate, etc., Co. *v.* Green, L. R. 7 C. P. 43. By statute in California application for relief from an irregular forfeiture must be made within six months. Civ. Code Cal., § 347.

[3] Knights' Case, L. R. 2 Ch. 321; Austin's Case, 24 L. T. (N. S.) 932; Woollaston's Case, 4 DeG. & J. 437; Lesseps *v.* Architects Co., 4 La. Ann. 316; Evans *v.* Smallcombe, L. R. 3 H. of L. 249; Prendergast *v.* Turton, 1 Younge & C. Ch. Cas. 98, s. c. 5 Jur. 1102; Sayre *v.* Citizens' Gas, etc., Co., 69 Cal. 207. But, see, Garden Gully, etc., Co. *v.* McLister, L. R. 1 App. Cas. 39, 55, holding that mere laches will not bar the shareholder from equitable relief against an invalid declaration of forfeiture. See, also, Ormsby *v.* Vermont, etc., Co., 56 N. Y. 623.

[4] Mitchell *v.* Vermont, etc., Co., 67 N. Y. 280; Sweny *v.* Smith, L. R. 7 Eq. 324. An unauthorized forfeiture may be enjoined. Moore *v.* New Jersey, etc., Co., 5 N. Y. Supp. 192; Green *v.* Abietine, etc., Co., 96 Cal. 322, 31 Pac. R. 100. But an injunction to restrain the sale of shares for assessments will not be granted where the plaintiff does not offer to pay the calls. Burnham *v.* San Francisco, etc., Co., 76 Cal. 24, 17 Pac. R. 939. Where the forfeiture is legal equity will seldom interfere because of hardship or the like. Sparks *v.* Liverpool Water-Works, 13 Ves. 428; Taylor *v.* North Star, etc., Co., 79 Cal. 285, s. c. 21 Pac. R. 753; Clark *v.* Barnard, 108 U. S. 436, 456; Vatable *v.* New York, etc., R. R. Co., 96 N. Y. 49; Marshall *v.* Golden Fleece, etc., Co., 16 Nev. 156. But see Glass *v.* Hope, 16 Grant (Upper Can.) Ch. 420; Iron R. R. Co. *v.* Fink, 41 Ohio St. 321, s. c. 22 Am. & Eng. R. R. Cas. 20, 52 Am. R. 84. Mandamus will not lie to compel a foreign corporation to annul a forfeiture. North State, etc., Co. *v.* Field, 64 Md. 151, 20 Atl. R. 1039. Damages may also be recovered where stock is wrongfully forfeited and sold. Allen *v.* Am. Bldg., etc., Ass'n, 49 Minn. 544, 52 N. W. R. 144; Budd *v.* Multnomah St. R. R. Co., 15 Ore. 413, s. c. 3 Am. St. R. 169; Ormsby *v.* Vermont, etc., Co., 56 N. Y. 623;

creditors whose interests are injured thereby.[1] It was held, however, in one of the cases to which we have referred in support of our last proposition, that where a corporation had made an assignment for the benefit of creditors, and the directors afterwards made a call and forfeited the plaintiff's stock for non-payment, without any express objection or assent on the part of the assignee, the plaintiff could not, without tendering the amount due or taking any steps to prevent the forfeiture, maintain a suit to annul the forfeiture and restore to him his rights as a stockholder.[2]

Re New Chile, etc., Co., 63 L. T. R. 344; Catchpole *v.* Ambergate, etc., R. Co., 1 El. & Bl. 111, s. c. 22 L. J. Q. B. 35.

[1] Germantown, etc., R. Co. *v.* Fitler, 60 Pa. St. 124; Grand Rapids Savings Bank *v.* Warren, 52 Mich. 557. It seems that the corporation itself can not, after forfeiting shares, set the forfeiture aside for irregularity in the notice, and hold the subscriber liable as a stockholder. Austin's Case, 24 L. T. (N. S.) 932.

[2] Germantown, etc., R. Co. *v.* Fitler, 60 Pa. St. 124, s. c. 100 Am. Dec. 546.

CHAPTER IX.

STOCKHOLDERS.

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§ 155. **When one becomes a stockholder.**—It is sometimes said that one who has subscribed for stock in an incorporated company does not become a stockholder until he has paid for such stock,[1] and, on the other hand, it is said that he does become a stockholder as soon as he subscribes to an unconditional agreement to take a certain number of shares.[2] It seems to us that it will not do to affirm as a general rule that payment of a subscription is essential to constitute the subscriber a stockholder, although this may doubtless be made essential by charter, statute, or authorized by-law;[3] nor will it do to say that a mere subscription, without anything more, will always be sufficient, but a complete and valid subscription is undoubtedly sufficient, as a general rule, where the subscriber is accepted by the corporation as a stockholder.[4] So, even where the subscription is irregular, or incomplete, or conditional, the subscriber may become a stockholder by acting as such and being treated as such by the corporation. And one may also become a stockholder by purchasing stock and having it transferred to him upon the books of the company. But where stock is issued in excess of the amount authorized by the char-

[1] Baltimore, etc., Ry. Co. *v.* Hambleton, 77 Md. 341, s. c. 26 Atl. R. 279; Busey *v.* Hooper, 35 Md. 15; Bates *v.* Great Western Tel. Co., 134 Ill. 546, 25 N. E. R. 521; St. Paul, etc., R. R. Co. *v.* Robbins, 23 Minn. 439; Minneapolis Harvester Works *v.* Libby, 24 Minn. 327.

[2] 1 Thomp. Corp., § 1138, citing Hartford & New Haven R. Co. *v.* Kennedy, 12 Conn. 499; Sagory *v.* Dubois, 3 Sandf. Ch. (N. Y.) 466; Union Turnpike Co. *v.* Jenkins, 1 Caines (N. Y.) 381; Spear *v.* Crawford, 14 Wend. (N. Y.) 20, s. c. 28 Am. Dec. 513; Burr *v.* Wilcox, 22 N. Y. 551; Upton *v.* Tribilcock, 91 U. S. 45; Brigham *v.* Mead, 10 Allen (Mass.) 245; Hartford, etc., R. Co. *v.* Croswell, 5 Hill (N. Y.) 383; Kennebec, etc., R. Co. *v.* Palmer, 34 Me. 366, and others.

[3] And where the contract is not a subscription but a purchase of new shares, payment may be required, as the delivery of a certificate and payment may be intended to be concurrent acts. 1 Morawetz Priv. Corp., § 61, citing Clark *v.* Continental Imp. Co., 57 Ind. 135; Weiss *v.* Mauch Chunk Co., 58 Pa. St. 295; Quick *v.* Lemon, 105 Ill. 578. A mere pledgee is not, ordinarily, a stockholder. Becher *v.* Wells, etc., Co., 1 McCrary (U. S.) 62; Baker *v.* Woolston, 27 Kan. 185, although he may become such to most intents and purposes by being registered as owner upon the books of the company. 2 Beach Priv. Corp., §§ 640, 641, 642; note to *Re* Argus Printing Co., 12 L. R. A. 781.

[4] Authorities cited in next to last note, *supra*. See, also, 1 Cook on Stock and Stockholders, § 10.

ter or governing law, a purchaser of certificates for shares so issued can not compel the corporation to accept him as a stockholder, although he may have an action for damages, and, as he does not obtain the rights of a stockholder he can not be held liable as a stockholder.[1] On the other hand, however, "if a corporation is authorized by law to increase its capital stock upon complying with certain prescribed forms or conditions, and the corporation or its agents appear to have endeavored to comply with the prescribed forms or conditions, and have in fact increased the company's capital stock by issuing new shares, on the assumption that the legal right to increase the capital stock had been acquired, and if the holder of such new shares has acted as a shareholder and enjoyed the rights of a shareholder, then the creation of such new shares will be recognized by the courts and given effect according to the intention of the parties, although the statutory forms or conditions were not complied with, and no legal right to create the new shares was in fact obtained."[2]

§ 156. **Rights of stockholders—Right to vote.**—A stockholder can not, ordinarily, be deprived of the property rights which attach to his membership, including his right to participate in the management of the company's business,[3] except by a regularly enforced forfeiture of his stock under charter or statutory authority.[4] The most important of these rights are those of sharing in the profits earned by the corporation,[5] and

[1] 2 Morawetz Priv. Corp., §§ 762, 763; Scovill *v.* Thayer, 105 U. S. 143. See, also, McCord *v.* Ohio, etc., R. R. Co., 13 Ind. 220; Oler *v.* Baltimore, etc., R. R. Co., 41 Md. 583; Laredo Imp. Co. *v.* Stevenson, 66 Fed. R. 633; Rood *v.* Whorton, 67 Fed. R. 434.

[2] 2 Morawetz Priv. Corp., § 763; 2 Beach. Priv. Corp., § 485; Chubb *v.* Upton, 95 U. S. 665; Kansas City Hotel Co. *v.* Hunt, 57 Mo. 126; Grangers' Life, etc., Ins. Co. *v.* Kamper, 73 Ala. 325; Veeder *v.* Mudgett, 95 N. Y. 295, 310.

[3] *In re* Long Island R. Co., 19 Wend. (N. Y.) 37; Hill *v.* Nisbet, 100 Ind. 341; Perrin *v.* Granger, 30 Vt. 595; Kennebec, etc., R. Co. *v.* Kendall, 31 Me. 470.

[4] If one has title to corporate stock, it can not be defeated by a subsequent resolution of the directors of the corporation. Gurney *v.* Union Transfer & S. Co., 25 Jones & S. (57 Super. Ct.) 444, 29 N. Y. S. R. 274, 8 N. Y. Supp. 549.

[5] See generally, Dividends, Ch. XV.

in the property remaining for distribution upon a dissolution of the corporation;[1] of helping to select the persons to manage the affairs of the corporation; and of aiding to shape its policy and control its action, or, in other words, of voting at stockholders' meetings. The right to vote usually belongs to the person in whose name the stock is registered,[2] or in case of his decease to his legally qualified administrator or executor;[3] although it has been held competent for a railroad company, in issuing certificates of preferred stock, to stipulate that the holders shall not have or exercise the right to vote at stockholders' meetings and persons accepting such shares will be bound thereby.[4] But, ordinarily, the right to vote is an incident to the ownership of shares of stock,[5] and the corporation can not by by-laws restrict[6] nor enlarge[7] the right to vote as fixed by the charter or by general statute.[8]

§ 157. **Who has right to vote—How determined.**—The books and records of a corporation determine who are its stockholders for the time being, and who have a right to vote, although the stock may have been sold or pledged as collateral

[1] See generally, Insolvency and Dissolution, Ch. XXIV.

[2] *In re* Long Island R. Co., 19 Wend. (N. Y.) 37; Beckett *v.* Houston, 32 Ind. 393; Monsseaux *v.* Urquhart, 19 La. Ann. 482; Vowell *v.* Thompson, 3 Cr. C. C. (U. S.) 428; Northrop *v.* Newton, etc., Turnpike Co., 3 Conn. 544.

[3] Matter of North Shore, etc., Ferry Co.,63 Barb. (N. Y.) 556; Matter of Cape May, etc., Co., 51 N. J. L. 78, s. c. 16 Atl. R. 191. Stock sold by three executors of the deceased owner can not be voted unless they agree upon the vote to be cast. Tunis *v.* Hestonville, etc., R. Co., 149 Pa. St. 70, s. c. 15 L. R. A. 665. See, also, *Re* Pioneer Paper Co., 36 How. Pr. (N. Y.) 111. As to right of partner to vote, see Allen *v.* Hill, 16 Cal. 113; Kenton Furnace, etc., Co. *v.* McAlpin, 5 Fed. R. 737.

[4] Miller *v.* Ratterman, 47 Ohio St., 141, 43 Am. & Eng. R. Cas. 339.

[5] 1 Beach Priv. Corp., § 274; Kreiger *v.* Shelby R. R. Co., 84 Ky. 66.

[6] Beckett *v.* Houston, 32 Ind. 393; Rex *v.* Spencer, 3 Burr. 1827.

[7] Taylor *v.* Griswold, 14 N. J. Law 222, holding that a by-law of the Hackensack Bridge Co. could not confer upon stockholders the right to one vote for each share they owned, where the number of votes was limited by the charter.

[8] But some of the states have statutes authorizing the corporations to make by-laws regulating the number of shares that shall entitle the members to one or more votes. Stimson's Am. Stat. Law (1892), § 8071.

security,[1] and the inspectors and tellers can not, as a rule, assume to go into a hearing and decision of the question as to who is in fact the owner of the stock sought to be voted.[2] The registry on the transfer books of the corporation is, as a general rule, *prima facie*, if not conclusive, evidence of the holder's right to vote the shares so registered in his name.[3] It is gen-

[1] Parker, C. J., in State *v.* Ferris, 42 Conn. 560; Brewster *v.* Hartley, 37 Cal. 15, s. c. 99 Am. Dec. 237; *Ex parte* Willcocks, 7 Cow. (N. Y.) 402, s. c. 17 Am. Dec. 525, where the stock was pledged; Scholfield *v.* Union Bank, 2 Cranch. C. C. (U. S.) 115; Vowell *v.* Thompson, 3 Cr. C.C. (U.S.) 428, where it was mortgaged. If mortgaged stock is transferred to the mortgagee, upon the books of the corporation, he and not the mortgagor will be entitled to vote it. So, generally, where the stock has been duly transferred upon the books of the company, and registered in the name of the pledgee, he is entitled to vote. 2 Beach Priv. Corp., § 642; *Re* Argus Printing Co., 1 N. Dak. 434, s. c. 12 L. R. A. 781; Hoppin *v.* Buffum, 9 R. I. 513, s. c. 11 Am. Rep. 291. Compare State *v.* Smith, 15 Oreg. 98. These cases state, however, that a court of equity may compel the pledgee to give the pledgor a proxy in a proper case. 1 Rorer on Railroads, 195, and authorities cited. In order that a stockholder may vote at a corporation election, it is not necessary that he be the sole or only owner. A creditor holding stock as collateral security may agree with the debtor owning the stock as to which shall vote at a corporate election, and they may appoint a third person to hold the stock and vote for them. Ervin *v.* Philadelphia, etc., R. Co., (C. P. Phila. Pa.) 7 R. R. & Corp. L. J. 87.

[2] 1 Thomp. Corp., § 748. Held *contra*, under New York statute, in Strong *v.* Smith, 15 Hun 222.

[3] In matter of Long Island R. Co., 19 Wend. (N. Y.) 37, 44; Turnbull *v.* Payson, 95 U. S. 418; State *v.* Ferris, 42 Conn. 560, 568 (where a bankrupt was permitted to vote); Morrill *v.* Little Falls, etc., Co., 53 Minn. 371, 21 L. R. A. 174; Semple *v.* Glenn, 91 Ala. 245, s. c. 24 Am. St. Rep. 894; and authorities cited in 23 Am. & Eng. Ency. of Law 782, note 1. But one railroad corporation, having acquired a majority of the stock of another railroad corporation, unless expressly authorized by statute, will not be allowed to vote such stock in the corporation elections or in matters concerning the management or control of the latter company; at least where the two roads are rivals in the same field of operation, and a conflict of interest may arise in the matter of expenditure, or in division of patronage or of earnings, or where the profits of one company may be increased by a diminution of those of the other. Memphis & C. R. Co. *v.* Woods, 88 Ala. 630, 7 L. R. A. 605. Where the contract for the present sale of shares of stock had been entered into and the stock delivered to a third person in escrow, to be delivered to the purchaser only on fulfillment of the terms of the sale, and by the terms of the contract the purchaser was to have the right to vote the stock, while the sale remained executory, it was held that the seller had no right to vote, although the statute made the certificates of stock, and the transfer books of the corporation *prima facie* evidence of the right to vote the stock. Com-

erally immaterial that he has no certificates of stock,[1] or has sold and transferred his certificates,[2] or that he owes the subscription price,[3] or that he is a mere nominal holder of stock belonging to another,[4] which has been registered newly for the purpose of voting.[5] But where the owner of the stock is not entitled to vote, as in a case where stock is owned by a non-resident under a charter which provides that only resident stockholders may vote, it has been held that a resident of the state who receives a colorable transfer of the stock, for the purpose of voting it, does not thereby become a legal voter.[6] Although the corporate books are the proper evidence of the right of an owner of shares to exercise a stockholder's rights and privileges, he is entitled to have a certificate issued to him as a voucher for his title, and to enable him the more readily to put his shares upon the market,[7] and where the books do not show who is the owner, the certificate is *prima facie* evidence of ownership.[8] Where his subscription is made upon a condition not yet performed, if the stockholder has been registered,

monwealth *v.* Patterson, 158 Pa. St. 476. Held not to be conclusive in Mudgett *v.* Horrell, 33 Cal. 25; Stephens *v.* Follett, 43 Fed. Rep. 842, s. c. 31 Am. & Eng. Corp. Cas. 466; Waterford, etc., R. R. Co. *v.* Pidcock, 8 Exch. 279; Chaffin *v.* Cummings, 37 Me. 76.

[1] Beckett *v.* Houston, 32 Ind. 393; Mitchell *v.* Beckman, 64 Cal. 117, s. c. 1 Am. & Eng. Corp. Cas. 40; Hawley *v.* Upton, 102 U. S. 314; New Hampshire Cent. R. R. Co. *v.* Johnson, 30 N. H. 390, s. c. 64 Am. Dec. 300; Crumlish *v.* Shenandoah Valley R. Co., (W. Va.), 22 S. E. Rep. 90; and authorities cited in 23 Am. & Eng. Ency. of Law 783, note 1.

[2] People *v.* Robinson, 64 Cal. 373; State *v.* Ferris, 42 Conn. 560; Bailey *v.* Railroad Co., 22 Wall. (U. S.) 604, 637.

[3] Birmingham, etc., R. Co. *v.* Locke, 1 Q. B. 256; Downing *v.* Potts, 23 N. J. Law 66, where nothing had been paid; Savage *v.* Ball, 17 N. J. Eq. 142, where the stock was issued in payment for work which had not been performed.

[4] State of Nevada *v.* Leete, 16 Nev. 242.

[5] The corporation can not require him to take oath as to the real ownership of the stock. People *v.* Kip, 4 Cowen (N. Y.) 382, note. And it may be compelled to register a transfer made for the purpose of qualifying the transferee to vote. Moffatt *v.* Farquhar, L. R. 7 Ch. D. 591. But see *post*, § 174.

[6] State, *ex rel.*, *v.* Hunton, 28 Vt. 594. See, also, *Re* Barker, 6 Wend. (N. Y.) 509.

[7] Johnson *v.* Albany, etc., R. Co., 40 How. Pr. (N. Y.) 193.

[8] Broadway Bank *v.* McElrath, 13 N. J. Eq. 24; *ante*, § 78.

he may vote upon the question whether such condition shall or shall not be performed.[1] The holder of shares issued as a stock dividend may vote upon such stock after registry, the same as upon any other,[2] and a transferee usually receives this right with the stock transferred.[3] It is frequently provided, however, that no stockholder can vote on stock, unless it has been standing in his name on the books of the corporation at least a certain number of days prior to the election or meeting.[4]

§ 158. **Right of trustees and receivers to vote.**—If the stock be registered in the name of the holder as trustee, he may yet vote it,[5] unless he be a trustee for the corporation itself, in which case the officers are chargeable with notice of the title which he holds, and his holding is subject to the rule that stock owned by the corporation can not be voted.[6] The fact that the holder of shares is designated as "cashier" or "president" on the company's books will not influence his right to vote, as such words are merely descriptive. And it has been held that a person who succeeds him in that position has no right to vote the shares so held unless they are regularly transferred to him by name.[7] The right of a receiver of stock to vote seems generally to have been conceded without question,[8] and it has been held that the court appointing him may direct him how to vote.[9]

[1] Greenville, etc., R. Co. *v.* Coleman, 5 Rich. Law (S. C.) 118.

[2] Bailey *v.* Railroad Co., 22 Wall. (U. S.) 604, 637. But the rule is different as to scrip dividends, convertible into stock. Bailey *v.* Railroad Co., 22 Wall. (U. S.) 604, 637.

[3] See Commonwealth *v.* Stevens, (Pa.) 32 Atl. Rep. 111.

[4] Stimson's Am. Stat. Law (1892), § 8054.

[5] Matter of Barker, 6 Wend. (N.Y.) 509; Hoppin *v.* Buffum, 9 R. I. 513.

[6] *Ex parte* Holmes, 5 Cow. (N. Y.) 426; American Railway Frog Co. *v.* Haven, 101 Mass. 398, s. c. 3 Am. R. 377; Brewster *v.* Hartley, 37 Cal. 15, s. c. 99 Am. Dec. 237. See, also, McNeely *v.* Woodruff, 13 N. J. L. 352; Union, etc., Ass'n *v.* Seligman, 92 Mo. 635.

[7] *Ex parte* Mohawk, etc., R. Co., 19 Wend. (N. Y.) 135. A contrary rule is upheld as more reasonable and just in Farmers', etc., Co. *v.* Chicago, etc., R. Co., 27 Fed. R. 146, 156. See, also, Mousseaux *v.* Urquhart, 19 La. Ann. 482. But it would seem that a transfer on the corporate book is a reasonable means of proving that such successor has been selected to fill the former officer's place.

[8] Cook on Stock and Stockholders, § 612.

[9] American Inv. Co. *v.* Yost, 25 Abb. N. C. (N. Y.) 274, note.

§ 159. **Right of corporations and voting trusts to vote.**—Corporations authorized to hold stock in another corporation are usually entitled to vote it.[1] And this they may do by an agent.[2] But one corporation can not, ordinarily, acquire and vote stock in another without statutory authority,[3] and a rival company which has acquired a majority of the stock in a corporation, without statutory authority, may be enjoined from voting it.[4] And so may a trust company which is a stockholder of corporate stock pledged as collateral for bonds of another corporation and which is also a trustee of the indebtedness of the corporation and an agent for its creditors, or a voting trust which holds a majority of the stock of a railroad company to be voted in the interest of another corporation.[5]

§ 160. **Number of votes to which stockholder is entitled—Cumulative voting.**—It seems that at common law, in the absence of any statute on the subject, each stockholder is entitled to but one vote.[6] But this is not the natural and reasonable rule in corporations whose capital represents a money investment, and it is generally provided in the laws for the creation

[1] Davis *v.* U. S., etc., Co., 77 Md. 35, 25 Atl. R. 982.

[2] State *v.* Rohlffs, (N. J.) 19 Atl. R. 1099.

[3] Brice Ultra Vires, 95; Woods *v.* Memphis, etc., R. R. Co., 5 Ry. & Corp. L. J. 372; State *v.* McDaniel, 22 Ohio St. 354; Valley R. R. Co. *v.* Lake Erie, etc., Co., 46 Ohio St. 44, s. c. 1 L. R. A. 412; Central R. R. Co. *v.* Collins, 40 Ga. 582.

[4] Memphis, etc., R. R. Co. *v.* Woods, 88 Ala. 630, s. c. 7 L. R. A. 605, and note Mack *v.* DeBardeleben, etc., Co., 90 Ala. 396, 8 So. R. 150; Milbank *v.* N. Y., etc., R. R. Co., 64 How. Pr. (N. Y.) 20. See, also, Buckeye, etc., Co. *v.* Harvey, 92 Tenn. 115, 20 S. W. R. 427. *Contra*, Camden, etc., R. R. Co. *v.* Elkins, 37 N. J. Eq. 273.

[5] Clarke *v.* Central R. R., etc., Co., 50 Fed. R. 338, s. c. 15 L. R. A. 683, and note. But see 1 Beach Priv. Corp., § 304–306. The Federal Courts have recently held that the purchase of stock in sugar refineries for the purpose of acquiring control of the business of refining and selling sugar in the United States is not in violation of the act of congress of July 2, 1890, and does not involve a monopoly or restraint of interstate commerce within the meaning of that act. United States *v.* E. C. Knight Co., 60 Fed. R. 934, affirmed in 15 Sup. Ct. R. 249, 156 U. S. 1; *In re* Greene, 52 Fed. R. 104. The authorities are reviewed in the opinion of the court and in the dissenting opinion in the case in the United States Supreme Court cited *supra*. See, also, Harvey *v.* Linville, etc., Co., (N. Car.) 24 S. E. R. 489.

[6] 1 Cook on Stock and Stockholders, § 608.

of railroad corporations, that the stockholders shall have one vote for each share of stock which they own,[1] although the total number of votes that may be cast by one stockholder is sometimes limited. It is also provided by constitution or statute in several of the states that, in voting for directors, each shareholder shall be entitled to as many votes as will equal the number of his shares multiplied by the number of directors to be elected.[2] This system of cumulative voting is intended to enable the minority to obtain a representation upon the board. Such a provision, however, would be unconstitutional so far as it applied to corporations previously chartered,[3] unless, perhaps, where the power to amend or repeal remains in the legislature.[4]

§ 161. **Quorum must be present.**—Before votes may be cast at a meeting, it is necessary that a certain number of stockholders or the holders of a certain number of shares[5] (called a quorum) shall be present. This number is frequently fixed by the by-laws,[6] and is generally a majority of the stock entitled to vote.[7] But if the body consists of an indefinite number and no provision is made upon the subject, those who actually assemble at a regularly called meeting may constitute a quorum.[8] And if the required number, or a quorum, be

[1] Hays *v.* Commonwealth, 82 Pa. St. 518. Such provision is made by general statute in most of the states. Stimson's Am. Stat. Law (1892), § 8054, citing the laws of New Hampshire, Vermont, Connecticut, New York, New Jersey, Indiana, Wisconsin, Maryland, Delaware, Virginia, Tennessee, Arkansas, Oregon, Colorado, Washington, Dakota, Idaho, Wyoming, Utah, South Carolina, Alabama, New Mexico, District Columbia, Oklahoma.

[2] 4 Am. & Eng. Ency. of Law, 956; 1 Cook on Stock and Stockholders, § 609, *a*; Wright *v.* Central, etc., Co., 67 Cal. 532, 13 Am. & Eng. Corp. Cas. 89, in which the system is fully explained. See, also, 3 Cyclopædia of Political Science, 526.

[3] Hays *v.* Commonwealth, 82 Pa. St. 518; Baker's Appeal, 109 Pa. St. 461; State *v.* Greer, 78 Mo. 188, s. c. 8 Am. & Eng. Corp. Cas. 328.

[4] Cross *v.* West Va., etc., Ry., 35 W. Va. 174, 12 S. E. R. 1071.

[5] Tennessee, etc., R. Co. *v.* East Alabama R. Co., 73 Ala. 426.

[6] Stimson's Am. Stat. Law (1892), § 8071.

[7] 1 Beach on Priv. Corp., § 276; Stimson's Am. Stat. (1892), § 8056.

[8] Morrill *v.* Little Falls, etc., Co., 53 Minn. 371, s. c. 21 L. R. A. 174; Craig *v.* First Presbyterian Church, 88 Pa. St. 42; Columbia, etc., Co. *v.* Meier,

present, a majority of the votes actually cast at the meeting will generally control in the absence of any special provisions as to the number of votes necessary to bind the corporation,[1] although it is frequently said or intimated that it requires a majority of those present.[2] It is held that a single shareholder, even though he owns a majority of the stock, can not hold a corporate meeting alone. There must generally be at least two to constitute a meeting.[3] But the holding would probably be different where a single individual is allowed to form a corporation,[4] as is the case in Iowa,[5] if the meeting was regular in other respects.

§ 162. **Voting by proxy.**—At common law the stockholder must cast his vote in person.[6] But authority to vote by proxy upon certain conditions and under certain restrictions is given

39 Mo. 53; Brown *v.* Pac. Mail, etc., Co., 5 Blatchf. (U. S.) 525; Field *v.* Field, 9 Wend. (N. Y.) 394; Rex *v.* Bellringer, 4 Term R. 810; 1 Thomp. Corp., § 725.

[1] State *v.* Green, 37 Ohio St. 227; Gowen's Appeal, 10 Week. N. Cas. 85. See, also, Gifford *v.* New Jersey R. Co., 10 N. J. Eq. 171; New Orleans, etc., R. Co. *v.* Harris, 27 Miss. 517, 537; Durfee *v.* Old Colony, etc., R. Co., 5 Allen (Mass.) 230, 242; Stevens *v.* Rutland, etc., R. Co., 29 Vt. 545. "If a quorum is present and a majority of the quorum vote in favor of a measure, it will prevail, although an equal number should refrain from voting. A majority of the number of members required to constitute a quorum is sufficient." Rushville Gas Co. *v.* City of Rushville, 121 Ind. 206, s. c. 6 L. R. A. 315; followed in State *v.* Dillon, 125 Ind. 65. In such a case, "silence is acquiescence rather than opposition." Cases just cited. See, also, Willcock Munic. Corp., § 546; How & Bemis Munic. Police Ord., 42; Launtz *v.* People, 113 Ill. 137; County of Cass *v.* Johnston, 95 U. S. 360, 369; State *v.* Chute, 34 Minn. 135; Atty.-General *v.* Shepard, 62 N. H. 383, s.c. 13 Am. St.R. 576; Oldknow *v.* Wainright, 2 Burr. 1017. *Contra*, Commonwealth *v.* Wickersham, 66 Pa. St. 134; Lawrence *v.* Ingersoll, 88 Tenn. 52, 6 L. R. A. 308.

[2] 1 Thomp. Corp., §§ 723, 728; Lawrence *v.* Ingersoll, 88 Tenn. 52, 6 L. R. A. 308. See, also, State *v.* Fagan, 42 Conn. 32 (under a statute), with which compare State *v.* Chapman, 44 Conn. 595.

[3] England *v.* Dearborn, 141 Mass. 590; Hopkins *v.* Roseclare Lead Co., 72 Ill. 373; Sharpe *v.* Dawes, 46 L. J. Q. B. 104.

[4] See Swift *v.* Smith, 65 Md. 428, s. c. 57 Am. R. 336; where one stockholder owned all the stock and was held to be, in effect, the corporation itself.

[5] Revised Code of Iowa (1888), §§ 1058, 1088.

[6] 1 Cook on Stock and Stockholders, § 610; Philips *v.* Wickham, 1 Paige (N. Y.) 590.

by general statute in many of the states,[1] and it may be and very often is conferred by a by-law.[2] And the suggestion has been made that the modern custom of voting by proxy in money-eyed corporations, without any regard to any express authority, which prevails in the United States, may have modified the common law so far as to permit evidence of such a usage to establish the right where it is not expressly conferred by charter or by statute.[3] A proxy should be in writing, and should be in such form and so executed as to bear reasonable evidence of being genuine and valid.[4] And the corporate officers may insist upon reasonable evidence of that fact before allowing it to be voted,[5] but they can not require sworn proof that the person executing the proxy is the owner of the stock it represents.[6] A proxy only confers the right to vote upon the measures contemplated by the person giving it,[7] and ordinarily

[1] Stimson's Am. Stat. Law (1892), § 8057. Where a statute provided that any stockholder might select his own proxy to represent him and vote at any election, it was held that a by-law, providing that no proxy could be voted except by a stockholder, was invalid. People's Home Sav. Bank *v.* Superior Court, 104 Cal. 649, s. c. 43 Am. St. Rep. 147; Matter of Lighthall Mfg. Co., 47 Hun (N. Y.) 258.

[2] State *v.* Tudor, 5 Day (Conn.) 329, s. c. 5 Am. Dec. 162; Commonwealth *v.* Detwiller, 131 Pa. St. 614, s. c. 7 L. R. A. 357. Many of the states give statutory authority for the making of by-laws to regulate this matter. Stimson's Am. Stat. Law (1892), § 8071; People *v.* Crossley, 69 Ill. 195. But the existence of such authority at common law is doubted in Philips *v.* Wickham, 1 Paige (N. Y.) 590, and is denied in Taylor *v.* Griswold, 14 N. J. Law 222, s. c. 27 Am. Dec. 33.

[3] Rorer on Railroads, 193; Woods' Railway Law, 150.

[4] But the mere omission of a date will not justify its rejection. Matter of Election of St. Lawrence Steamboat Co., 44 N. J. L. 529. The by-laws may require proxies to be witnessed. Harben *v.* Phillips, L. R. 23 Ch. D. 14, 22. One to whom a testator has by will directed his executors to give a proxy to cast the vote for stock held by the testator can not vote when the executors refuse the proxy, because of inability to agree as to how the vote shall be cast. Tunis *v.* Hestonville, etc., R. Co., 149 Pa. St. 70.

[5] Matter of Election of St. Lawrence Steamboat Co., 44 N. J. Law 529. But if it has every appearance of genuineness and is regular in form, the officers can not refuse it. Matter of Cecil, 36 How. Pr. (N. Y.) 477.

[6] People *v.* Tibbets, 4 Cowen (N. Y.) 358.

[7] A proxy to vote is not a proxy to demand a poll. *In re* Haven, etc., Co., L. R. 20 Ch. D. 151; Reg. *v.* Gov. Stock Co., L. R. 3 Q. B. D. 442. The appointment of a proxy without limitation, gives him authority to bind his principal by a vote against his interest as well as for it, to the same extent as

only gives authority to vote for officers.[1] One who holds stock of a railroad company in trust for corporations owning competing lines, and is forbidden by law to hold such stock, and who is largely interested in such competing lines, does not, by a relinquishment of such stock made by such competing corporations in his favor, acquire any right to vote the same.[2] A naked proxy is revocable.[3]

§ 163. **Other powers of stockholders—Rights of minority.** —Besides electing officers, the corporate shareholders in meeting assembled have power to make the by-laws of the corporation,[4] to increase or decrease the capital stock under authority of the legislature,[5] to accept or authorize amendments of a certain kind to the charter,[6] to dissolve the corporation for an

if the vote were cast in person. Mobile, etc., R. Co. *v.* Nicholas, 98 Ala. 92.

[1] 1 Cook on Stock and Stockholders, § 610. He can not vote to dissolve the corporation or to sell the entire corporate property and business. 1 Cook on Stock and Stockholders, § 610. A proxy at a stockholders' meeting to elect directors may vote on motions to take a ballot and to adjourn the same as a stockholder. Forsyth *v.* Brown, 13 Pa. Co. Ct. Rep. 576.

[2] Clarke *v.* Central R., etc., Co., 50 Fed. Rep. 338. A railroad which owns stock of a competing line may be enjoined from voting the same at the suit of stockholders of the competitor, who have acquiesced in its ownership of such stock and control of such line for more than six years. George *v.* Central R., etc., Co., 101 Ala. 607, 14 So. Rep. 752.

[3] Woodruff *v.* Dubuque, etc., R. R. Co., 30 Fed. Rep. 91; Vanderbilt *v.* Bennett, 2 Ry. and Corp. L. J. 409; Reed *v.* Bank, 6 Paige (N. Y.) 337. See, also, Cone's Exrs. *v.* Russell, 48 N. J. Eq. 208, 21 Atl. Rep. 847. And this is the general rule in regard to proxies. 1 Cook on Stock and Stockholders, § 610.

[4] 2 Cook on Stock and Stockholders (2d ed.), § 700, a.; Angell & Ames on Corp. (8th ed.), § 327; Morton, etc., Co. *v.* Wysong, 51 Ind. 4. But it is frequently provided by charter or otherwise that the by-laws shall be made by the directors. Angell & Ames, *supra*; Stimson's Am. Stat. (1892), §§ 8070, 8071, 8537.

[5] Percy *v.* Millaudon, 3 La. 568, 585; Crandall *v.* Lincoln, 52 Conn. 73, 99; Eidman *v.* Bowman, 58 Ill. 444; Railway Co. *v.* Allerton, 18 Wall. 233; Finley, etc., Co. *v.* Kurtz, 34 Mich. 89.

[6] Marlborough Mfg. Co. *v.* Smith, 2 Conn. 579; Peoria & R. I. R. R. Co. *v.* Preston, 35 Iowa 115; Taggart *v.* Western R. R. Co., 24 Md. 563; Brown *v.* Fairmount Mine Co., 10 Phil. (Pa.) 32. A material or fundamental amendment must be accepted by a unanimous vote of the stockholders. Marietta, etc., R. Co. *v.* Elliott, 10 Ohio St. 57; New Orleans, etc., R. Co. *v.* Harris, 27 Miss. 517. A dissenting stockholder will not be bound there-

authorized cause,[1] and the like.[2] The right to vote includes the right to a voice in the settlement of these various questions. But the rights of the minority must be respected, and a single stockholder has been held to be able, by refusing his assent, to prevent a material amendment to the charter,[3] as he may a dissolution,[4] where it is not authorized or not made with a *bona fide* intention to pay the corporate debts and discontinue the business.

§ 164. **Stockholders' meetings.**—In matters which must be settled by the body of the stockholders, the assent of a majority of them, expressed elsewhere than at a meeting,—as, where the assent of each is given separately and at different times to a person who goes to them privately,—is not binding upon the company.[5] But provision is sometimes made by statute for the stockholders to perform certain acts, such as the adoption of

by. Snook *v.* Georgia Improvement Co., 83 Ga. 61. Where the amendment does not work any material change in the corporation, the will of the majority should govern. Sprague *v.* Illinois River R. Co., 19 Ill. 174. But the right to amend without any acceptance by the stockholders is generally reserved by the legislature.

[1] Mobile, etc., R. Co. *v.* State, 29 Ala. 573, 586; Chesapeake, etc., Co. *v.* Baltimore, etc., Co., 4 Gill. & J. (Md.) 1, 121; LaGrange, etc., R. Co. *v.* Rainey, 7 Coldw. (Tenn.) 420; Denike *v.* New York, etc., Co., 80 N. Y. 599, 606; McIntyre Poor School *v.* Zanesville Canal, etc., Co., 9 Ohio 203; Houston *v.* Jefferson College, 63 Pa. St. 428.

[2] Eidman *v.* Bowman, 58 Ill. 444; Metropolitan, etc., R. Co. *v.* Manhattan, etc., R. Co., 11 Daly (N. Y.) 367.

[3] Fry's Ex'rs. *v.* Lexington, etc., R. Co., 2 Metc. (Ky.) 314; Delaware, etc., R. Co. *v.* Irick, 23 N. J. L. 321; Pearce *v.* Madison, etc., R. Co., 21 How. 441; Tuttle *v.* Mich. Air Line Co., 35 Mich. 247; Marietta, etc., R. Co. *v.* Elliott, 10 Ohio St. 57; New Orleans, etc., R. Co. *v.* Harris, 27 Miss. 517. *Ante*, § 45.

[4] Ervin *v.* Oregon R., etc., Co., 27 Fed. R. 625; Black *v.* Delaware, etc., Canal Co., 22 N. J. Eq. 130, where the object was to continue business under a new organization; Kean *v.* Johnson, 9 N. J. Eq. 401; VonSchmidt *v.* Huntington, 1 Cal. 55; Barton *v.* Enterprise, etc., Ass'n, 114 Ind. 226, where the corporation charter had not expired; Angell & Ames (8th ed.), § 772.

[5] Duke *v.* Markham, 105 N. C. 131. But it is held that a certificate signed by the president of a corporation, who holds nearly all of its stock, stating that a majority of the stockholders has assented thereto, implies that he has assented, and such certificate is sufficient assent of the majority of the stockholders, unless the statute provides some particular form or place for such assent. Humphreys *v.* St. Louis, I. M. & S. R. Co. (C. C. S. D. N. Y.), 37 Fed. Rep. 307.

by-laws, by giving a written consent thereto, without the formality of a meeting.[1] Stockholders' meetings should be held within the state by which the corporation is created. It is sometimes said that acts performed at a meeting in a foreign jurisdiction are void,[2] but the better rule would seem to be that, in the absence of any provision to the contrary, the acts of the stockholders at such a meeting are voidable rather than void, and may be valid where all the stockholders give their consent.[3] In other words, the corporation and the stockholders in such a case are estopped from questioning upon this ground the validity of the meeting and proceedings, to which they consented and in which they participated. If the corporation is consolidated or incorporated in two or more states, so as to be a citizen of each, the stockholders may lawfully meet in either state.[4] Where the officers of a corporation neglect and refuse to call a meeting which it is their duty to call, they may be compelled to do so, in a proper case, by *mandamus* at the suit of a stockholder.[5] In order to bind absent and

[1] The written assent of two-thirds of the stock is sometimes made sufficient to adopt by-laws without a meeting. Stimson's Am. Stat. (1892), § 8872.

[2] Miller *v.* Ewer, 27 Me. 509, s. c. 46 Am. Dec. 619; Aspinwall *v.* Ohio, etc., R. Co., 20 Ind. 492, s. c. 83 Am. Dec. 329. See, also, Hilles *v.* Parrish, 14 N. J. Eq. 380; Franco-Texan Land Co. *v.* Laigle, 59 Tex. 339; Hodgson *v.* Duluth, etc., R. Co., 46 Minn. 454, 49 N. W. Rep. 197; Ormsby *v.* Vermont, etc., Co., 56 N. Y. 623; 1 Beach Priv. Corp., § 285. See, also, Mack *v.* De Bardelehen, etc., Co., 90 Ala. 396, 8 So. Rep. 150.

[3] Missouri Lead, etc., Co. *v.* Reinhard, 114 Mo. 218, s. c. 35 Am. St. Rep. 746; Heath *v.* Silverthorn, etc., Co., 39 Wis. 146; Handley *v.* Stutz, 139 U. S. 417, 11 Sup. Ct. Rep. 530, appeal from Stutz *v.* Handley, 41 Fed. R. 531; 1 Morawetz Priv. Corp., § 488; Taylor on Corp., § 382; 1 Cook on Stock and Stockholders, § 589. See, also, Wright *v.* Lee, 2 S. Dak. 596, 51 N. W. Rep. 706. There is more reason, perhaps, for holding that meetings for the purpose of accepting the charter and organizing should be held within the state. Smith *v.* Silver Valley, etc., Co., 64 Me. 85, s. c. 54 Am. Rep. 760; Freeman *v.* Machias, etc., Co., 38 Me. 343; 1 Beach Priv. Corp., § 286; *ante*, § 17.

[4] Covington, etc., Bridge Co. *v.* Mayer, 31 Ohio St. 317; Graham *v.* Boston, etc., R. Co., 118 U. S. 161; *ante*, § 28. But see Aspinwall *v.* Ohio, etc., R. Co., 20 Ind. 492, s. c. 83 Am. Dec. 329.

[5] People *v.* Cummings, 72 N. Y. 433; McNeely *v.* Woodruff, 13 N. J. L. 352; State *v.* Wright, 10 Nev. 167. See, also, American Ry. Frog. Co. *v.* Haven, 101 Mass. 398, s. c. 3 Am. Rep. 377.

dissenting stockholders, the meeting must be duly assembled.[1] Members are bound to take notice of regular stated meetings fixed by the charter or by-laws ;[2] but they should be duly notified of special or called meetings,[3] and the statute or by-laws may, of course, provide for notice of all meetings. The provisions of the charter or by-laws in regard to the time and manner of calling meetings and the nature of the notice should be followed ;[4] but a by-law providing that notice may be given in a certain way is not necessarily exclusive.[5] In the absence of any express provision, personal notice, if not absolutely essential, is certainly the safest.[6] The essential elements of the notice are the time of the meeting,[7] the place of the meeting,[8] and the business to be transacted,[9] unless the stockholders, by

[1] It should be called by the authorized officers or persons. See Reilly *v.* Oglebay, 25 W. Va. 36; Cassell *v.* Lexington, etc., Co. (Ky.) 9 S. W. Rep. 502; Evans *v.* Osgood, 18 Me. 213; Johnston *v.* Jones, 23 N. J. Eq. 216.

[2] Warner *v.* Mower, 11 Vt. 385; State *v.* Bonnell, 35 Ohio St. 10; People *v.* Batchelor, 22 N. Y. 128.

[3] Commonwealth *v.* Cullen, 13 Pa. St. 133, s. c. 53 Am. Dec. 450; Farwell *v.* Houghton Copper Works, 8 Fed. Rep. 66; Kynaston *v.* Mayor, 2 Strange 1051; Rex *v.* Hill, 4 Barn. & Cress. 426; Angell & Ames Corp., § 492; 1 Beach Priv. Corp., § 279; Stow *v.* Wyse, 7 Conn. 214, s. c. 13 Am. Dec. 99, and note.

[4] Stockholders of Shelby R. Co. *v.* Louisville, etc., R. Co., 12 Bush (Ky.) 62; Hunt *v.* School Dist., 14 Vt. 300, s. c. 39 Am. Dec. 225; Tuttle *v.* Michigan Air Line R. Co., 35 Mich. 247.

[5] Citizens' Mut. Ins. Co. *v.* Sortwell, 8 Allen (Mass.) 217.

[6] Stow *v.* Wyse, 7 Conn. 214, s. c. 18 Am. Dec. 99. See, also, Wiggin *v.* Freewill Baptist Church, 8 Metc. (Mass.) 301; Harding *v.* Vandewater, 40 Cal. 77.

[7] It has been held that the hour, as well as the day, must be stated. San Buenaventura, etc., Co. *v.* Vassault, 50 Cal. 534, 537. The fact that there is some delay in calling the meeting to order will not, as a rule, invalidate it, but holding it before the time designated may operate as a surprise upon some of the stockholders and give those who do not participate just cause for attacking its validity as to them. People *v.* Albany, etc., R. Co., 55 Barb. (N. Y.) 344. The notice should also be served a reasonable time before the meeting, although this is usually fixed by the statute or by-laws. *In re* Long Island R. Co., 19 Wend. (N. Y.) 37, s. c. 32 Am. Dec. 429; Brown *v.* Republican, etc., Mines, 55 Fed. Rep. 7; Covert *v.* Rogers, 38 Mich. 363, s. c. 31 Am. Rep. 319.

[8] Angell & Ames Corp., § 496; Jones *v.* Milton Turnp. Co., 7 Ind. 547; United States *v.* McKelden, 8 The Rep. 778.

[9] Notice of the ordinary business to be transacted at a general stated meeting is usually unnecessary. Chicago, etc., Ry. Co. *v.* Union Pac. Ry. Co., 47 Fed. Rep. 15; Warner *v.* Mower, 11

reason of some provision in the charter or by-laws, are already chargeable with knowledge of one or more of these things. An appearance at the meeting without objection will usually operate as a waiver of objections to the notice.[1] And where a meeting is duly called and held, the corporation may adjourn and transact any business at the adjourned meeting which they could have transacted at the original meeting, without giving any additional notice other than that implied in the adjournment.[2] It will be presumed, in the absence of anything to the contrary, that a meeting attended by a quorum was duly called.[3]

§ 165. **Remedies of stockholders.**—A stockholder has the further right to bring an action to obtain redress for wrongs done to the corporate rights or to restrain *ultra vires* acts done in the name of the corporation in cases where the corporation, upon request, refuses to bring the suit,[4] and where the persons

Vt. 385; Sampson *v.* Bowdoinham, etc., R. Co., 36 Me. 78; Merritt *v.* Ferris, 22 Ill. 303. But notice of the business to be transacted at a special meeting is generally essential, and no other business can be regularly transacted than that specified in the notice. Atlantic Delaine Co. *v.* Mason, 5 R. I. 463; People's Mut. Ins. Co. *v.* Westcott, 14 Gray. (Mass.) 440; Rex *v.* Mayor, etc., of Doncaster, 2 Burr 738. See, also, Bridport Old Brewery Co., L. R. 2 Ch. 191; *In re* London, etc., Co., L. R. 31 Ch. D. 223; Tuttle *v.* Michigan Air Line R. Co., 35 Mich. 247; 1 Beach Priv. Corp., § 279.

[1] Stutz *v.* Handley, 41 Fed. Rep. 531, s. c. Handley *v.* Stutz, on appeal, 139 U. S. 417, s. c. 11 Sup. Ct. Rep. 530; Union Pac. Ry. Co. *v.* Chicago, etc., Ry. Co., 51 Fed. Rep. 309; Jones *v.* Milton Turnp. Co., 7 Ind. 547; People *v.* Peck, 11 Wend. (N. Y.) 604, s. c. 27 Am. Dec. 104; Kenton Furnace Co. *v.* McAlpin, 5 Fed. Rep. 737; Campbell *v.* Argenta, etc., Co., 51 Fed. Rep. 1; Wood *v.* Corry, etc., Co., 44 Fed. Rep. 146; Nelson *v.* Hubbard, 96 Ala. 238, 11 So. Rep. 428; Bucksport, etc., R. Co. *v.* Buck, 68 Me. 81.

[2] Warner *v.* Mower, 11 Vt. 385; Smith *v.* Law, 21 N. Y. 296; Granger *v.* Grubb, 7 Phila. (Pa.) 350; Rex *v.* Carmarthen, 1 Maule & S. 697; Scadding *v.* Lorant, 3 H. L. Cas. 418. But see, where there is bad faith and stockholders are taken advantage of, State *v.* Bonnell, 35 Ohio St. 10; New York, etc., Co. *v.* Parrott, 36 Fed. Rep. 462; also State *v.* Phillips, 79 Me. 506, 10 Atl. Rep. 447; Reg. *v.* Grimshaw, L. R. 10 Q. B. 747 (new and different business can not be transacted).

[3] Sargent *v.* Webster, 13 Metc. (Mass.) 497, s. c. 46 Am. Dec. 743; McDaniels *v.* Flower Brook, etc., Co., 22 Vt. 274; Beardsley *v.* Johnson, 121 N. Y. 224; Wells *v.* Rodgers, 60 Mich. 525, 27 N. W. Rep. 671; Lane *v.* Brainerd, 30 Conn. 565.

[4] Teachout *v.* Des Moines, etc., St.

who are despoiling the corporation or who have caused it to exceed its powers, are in control of it.[1] Thus a suit brought by a stockholder on behalf of his corporation against the directors and others, has been sustained, where he sought redress for frauds, wrongs, and breaches of trust, and to recover from them money of which the corporation had been

R. Co., 75 Iowa 722; Foster *v.* Mansfield, etc., R. Co., 36 Fed. R. 627; Memphis, etc., R. Co. *v.* Woods, 88 Ala. 630; Wilkie *v.* Rochester, etc., R. Co., 12 Hun (N. Y.) 242; Stevens *v.* Rutland, etc., R. R. Co., 29 Vt. 545; Putnam *v.* Ruch, 56 Fed. R. 416; Taylor *v.* Holmes, 127 U. S. 489; Hawes *v.* Oakland, 104 U. S. 450; Mack *v.* DeBardeleben, etc., Co., 90 Ala. 396, 9 L. R. A. 650, and note; Atwood *v.* Merryweather, L. R. 5 Eq. 464, note. A request and refusal of the corporation to sue must generally be shown, or a sufficient excuse for failure to make the request. Atchison, etc., R. Co. *v.* Board, 51 Kan. 617; Latimer *v.* Richmond, etc., R. Co., 39 S. C. 44, 17 S. E. R. 258; Whitney *v.* Fairbanks, 54 Fed. R. 985; Weidinfelder *v.* Allegheny, etc., R. Co., 47 Fed. R. 11; Beshoar *v.* Chappell, (Colo.), 40 Pac. R. 244. Where a corporation expired by limitation in its charter, but its existence was continued thereafter by statute for the purpose of winding up its business, such limitation in its charter is not sufficient ground for bringing a suit in the name of some of the stockholders in behalf of the corporation, to recover its property, where no application has been made to the directors. Taylor *v.* Holmes, 127 U. S. 489, s. c. 8 Sup. Ct. R. 1192.

[1] Heath *v.* Erie R. Co., 8 Blatchf. (U. S.) 347; Dowd *v.* Wisconsin, etc., R. Co., 65 Wis. 108; Parrott *v.* Byers, 40 Cal. 614; Board, etc., *v.* Lafayette, etc., R. Co., 50 Ind. 85; Currier *v.* N. Y., etc., R. Co., 35 Hun (N. Y.) 355; *Re* Oshkosh, etc., Co., 77 Wis. 366, 9 L. R. A. 273, and note; Miner *v.* Belle Isle Ice Co., 93 Mich. 97, 17 L. R. A. 412. The minority stockholders can not enjoin acts of the majority stockholders or directors of a corporation in relation to its internal management, such as executing a perpetual lease of its railroad and franchises, where the acts complained of are neither fraudulent nor illegal. And the mere fact that defendants are also the majority stockholders and officers of the corporation to which the proposed lease is to be made is not sufficient to establish fraud. Shaw *v.* Davis, (Md.), 28 Atl. R. 619, s. c. 23 L. R. A. 294. Where the suit is against those in control of the corporation, no request that they shall bring the suit is necessary. George *v.* Central R., etc., Co., 101 Ala. 607, 14 So. R. 752; Sage *v.* Culver, 71 Hun (N. Y.) 42; Smith *v.* Dorn, 96 Cal. 73; Landis *v.* Sea Isle, etc., Co., (N. J.) 31 Atl. R. 755. See, also, Higgins *v.* Lansingh, 154 Ill. 301, 40 N. E. R. 362. Where a majority stockholder of a railroad company elects and controls its board of directors, and obtains a lease of its railroad at a nominal rental, any minority stockholder may sue in his own name for the fraud committed on the company. Pondir *v.* New York, etc., R. Co., 72 Hun (N. Y.) 384; Earle *v.* Seattle, etc., R. Co., 56 Fed. R. 909. Where it is merely a question of corporate policy, and no question of fraud or illegality of the proposed action of the corporation is raised,

defrauded.[1] In such a suit, the corporation should be joined as a defendant,[2] as the court can not pass upon its rights unless it is brought into court. It has also been held that a stockholder may enjoin the performance of an *ultra vires* contract to which all the other stockholders have consented although he is not specially injured thereby.[3]

§ 166. **Unregistered assignees and third persons can not sue.**—An assignee of railroad stock, who has not registered his stock, nor obtained recognition as a stockholder, can not bring suit in behalf of himself and other stockholders to restrain the officers of the corporation from *ultra vires* and illegal acts.[4]

equity will not interpose to control the action of directors to whom the charter confides the management of corporate affairs. Ellerman *v.* Chicago Junct. R., etc., Co., 49 N. J. Eq. 217; Wheeler *v.* Pullman, etc., Co., 143 Ill. 197, 17 L. R. A. 818.

[1] Beach *v.* Cooper, 72 Cal. 99; Putnam *v.* Ruch, 54 Fed. R. 216. A stockholder may bring an action to enjoin the directors from unlawfully transferring the stock to a consolidated corporation, and he need not consult with the directors with reference thereto. Botts *v.* Simpsonville & B. C. Turnp. Co., 88 Ky. 54, 2 L. R. A. 594, 10 S. W. R. 134.

[2] Kennebec., etc., R. Co. *v.* Portland, etc., R. Co., 54 Me. 173, 181; Bagshaw *v.* Eastern R. Co., 7 Hare 114; Heath *v.* Erie, etc., Co., 8 Blatchf. (U. S.) 347, 394; Curran *v.* Arkansas, 15 How. (U. S.) 304; Brewer *v.* Boston Theater, 104 Mass. 378; Cook on Stock and Stockholders, § 738, and numerous authorities cited. The general rule is that the corporation is a necessary party, either as a plaintiff or defendant. Zinn *v.* Mendel, 9 W. Va. 580; Greaves *v.* Gouge, 52 How. Pr. 58, s. c. 69 N. Y. 154; Western R. R. Co. *v.* Nolan, 48 N. Y. 513; Hersey *v.* Veazie, 24 Me. 9, s. c. 41 Am. Dec. 364; Davenport *v.* Dows, 18 Wall. (U. S.) 626.

[3] Byrne *v.* Schuyler, etc., Co., (Conn.) 31 Atl. R. 833, and cases cited.

[4] Brown *v.* Duluth, etc., R. Co., 53 Fed. R. 889. See, also, Heath *v.* Erie Ry. Co., 8 Blatchf. (U. S.) 347; Hersey *v.* Veazie, 24 Me. 9; Ramsey *v.* Erie Ry. Co., 7 Abb. Pr. N. S. (N.Y.) 156. But, compare Ervin *v.* Oregon, etc., Co., 28 Hun (N. Y.) 269; Parrott *v.* Byers, 40 Cal. 614; Bagshaw *v.* Eastern, etc., Ry. Co., 7 Hare 114; Moore *v.* Silver, etc., Co., 104 N. C. 534, 10 S. E. R. 679. A bill to enjoin corporate acts which does not allege fraud on the part of the directors, or that they are threatening to do some act *ultra vires* or for their own interests, in a manner injurious to, or destructive of, the rights of other shareholders, and that the plaintiffs have made an earnest effort to obtain redress within the corporation itself, is insufficient on demurrer. Latimer *v.* Richmond, etc., R. Co., 39 S. C. 44, 17 S. E. 258; Atchison, etc., R. Co. *v.* Board, etc., 51 Kan. 617; Roman *v.* Woolfolk, 98 Ala. 219. But where the complaint shows that a rival corporation has secured control of the company, and acts of itself and its officers amounting to fraud upon the

Parties who never paid, or agreed to pay, anything for corporate stock issued to them, are not, ordinarily, shareholders, and can not, as a rule, maintain an action as such.[1] The expectant owner of stock in a corporation, before becoming a stockholder, can neither be heard to complain of acts of the corporation which may be *ultra vires*, nor be permitted to interfere in any way in the affairs of the company.[2] To enable one or more stockholders to maintain in a federal court of equity, a suit which should properly be brought by the corporation itself, they must show that they were shareholders at the time of the transaction complained of, or that the shares have devolved on them since by operation of law.[3]

§ 167. **When stockholders may sue or become parties.**— Stockholders have been permitted to sue on behalf of the corporation to remove a cloud from the corporate title to real estate,[4] and to compel payment of subscriptions.[5] But, on the other hand, a stockholder has been denied the right to sue for a trespass upon the company's property,[6] and he can not take

rights of plaintiff are stated, the complaint is sufficient. Earle *v.* Seattle, etc., R. Co., 56 Fed. R. 909.

[1] Arkansas River Land, T. & C. Co. *v.* Farmers' Loan & Trust Co., 13 Colo. 587, 22 Pac. 954; Hinchley *v.* Pfister, 83 Wis. 64, 53 N. W. R. 21. See, also, Busey *v.* Hooper, 35 Md. 15. Purchasers of stock have the right to demand that a contract of the corporation be canceled on the ground that it is *ultra vires*, and a wrongful refusal to transfer stock on the books of the company can not defeat that right. Carson *v.* Iowa City Gaslight Co., 80 Iowa 638, 45 N. W. R. 1068.

[2] Mayer *v.* Denver, T. & Ft. W., R. Co., (C. C. S. D. N. Y.) 38 Fed. R. 197, 6 Ry. & Corp. L. J. 49.

[3] Dimpfell *v.* Ohio, etc., R. Co., 110 U. S. 209. Rule 94, U. S. Rules of Practice in Equity Cases, 104 U. S. IX. A suit removed to the federal court from a state court will not be dismissed for failure to comply with this rule since it applies only to suits originally begun in the federal court. Earle *v.* Seattle, etc., R. Co., 56 Fed. R. 909. Where stock was transferred merely by indorsement and not by issuing certificates, the stockholder must show that he purchased the stock in good faith and not for mere purpose of vexation, before he can sue for redress for fraudulent transaction committed by officers or others before he became a stockholder. Moore *v.* Silver Valley Min. Co., 104 N. C. 534, 10 S. E. 679.

[4] Baldwin *v.* Canfield, 26 Minn. 43, 56.

[5] Wallworth *v.* Holt, 4 Mylne & Cr. 619.

[6] Dale *v.* Grant, 34 L. J. 142.

an appeal in a suit which it has lost.[1] In cases involving fraud and collusion he must move promptly to assert his rights, upon gaining knowledge of the wrongful acts complained of, for if he participates or acquiesces in unwarrantable acts of the officers or of a majority of the stockholders, he will be bound by them.[2] He will not be permitted to wait until he can see whether the unauthorized act is for the advantage of the corporation, and in case it proves disastrous sue to set it aside.[3] The fact that the plaintiff bought his stock expressly to enable him to bring the suit is not necessarily a ground for refusing relief.[4] If it appears that the plaintiff is prosecuting the suit

[1] Silk Mfg. Co. *v.* Campbell, 27 N. J. L. 539.

[2] Memphis, etc., R. Co. *v.* Grayson, 88 Ala. 572; Burgess *v.* St. Louis County R. Co., 99 Mo. 496. An act not expressly prohibited by law, but unauthorized in the charter of the corporation, which affects only the interests of the stockholders, may be made good by the assent of the stockholders, so as to protect strangers dealing with them in good faith. Hollins *v.* St. Paul, M. & M. R. Co., (Sup. Ct.) 29 N. Y. S. R. 208, 8 R. R. & Corp. L. J. 117. So, a purchaser of stock with notice that it was voted in favor of the illegal act can not complain of such act. Brown *v.* Duluth, etc., Ry., 53 Fed. R. 889; Wood *v.* Corry, etc., Co., 44 Fed. R. 146; Barr *v.* N. Y., etc., R. R., 125 N. Y. 263; *In re* Syracuse, etc., R. R., 91 N. Y. 1. Several of these cases apply this doctrine even to transferees without notice of the fraud, but in Parsons *v.* Joseph, 92 Ala. 403, 8 So. R. 788, its application to *bona fide* purchasers is denied.

[3] Atchison, etc., R. Co. *v.* Fletcher, 35 Kan. 236; Burgess *v.* St. Louis County R. Co., 99 Mo. 496. For an instance in which it was held that the stockholder acted with sufficient promptness, see Byrne *v.* Schuyler, etc., Co., (Conn.) 31 Atl. R. 833.

[4] Ramsay *v.* Erie R. Co., 8 Abb. Pr. (N. Y.) N. S. 174; Young *v.* Drake, 8 Hun (N. Y.) 61; Winsor *v.* Bailey, 55 N. H. 218; Elkins *v.* Camden, etc., R. R. Co., 36 N. J. Eq. 5; City of Chicago *v.* Cameron, 22 Ill. App. 91, Aff'd 120 Ill. 447; Cook on Stock and Stockholders, § 736. But see *ante*, note 3, page 241, and Alexander *v.* Searcy, 81 Ga. 536, 8 S. E. R. 630. The fact that the certificates of stock were not issued to him until after a corporation had accepted an unconstitutional amendment to its charter will not preclude one, having a vested right to stock of the corporation by virtue of stock receipts, from enforcing his rights against an attempt to misappropriate funds under such amendment. Hill *v.* Glasgow R. Co. (C. C. D. Ky.) 41 Fed. R. 610. The fact that plaintiff became a stockholder after commission of the acts complained of does not defeat his right to begin the action, which is brought directly for the benefit of the corporation. City of Chicago *v.* Cameron, 22 Ill. App. 91, Aff'd. in 9 West. R. 507, 120 Ill. 447, 11 N. E. 899. But it has been held that where the transfer is merely nominal the transferee can not main-

at the instance and for the benefit of others who are not stockholders, and who indemnify him against the costs of the suit, the court will not interfere by interlocutory injunction.[1] Nor will it readily grant this extraordinary relief before hearing, where the measures are of evident expediency, and have the approbation of all the other stockholders, although proper relief will not be denied upon final hearing if the acts complained of are shown to be *ultra vires*.[2] The fact that a rival company merely instigated the suit is not a reason for denying relief to which the stockholders are shown to be entitled,[3] although the court may decline to entertain a suit by shareholders in such a company who have purchased shares in the rival company for purpose of litigation.[4] And in cases where the corporation neglects or refuses to defend a suit because of fraud and collusion on the part of the corporate officers, a stockholder may, according to some authorities, be admitted as a defendant, and allowed to set up any defenses which the corporation might have offered to the suit.[5] But other authorities hold that the proper means by which the stockholders should protect their rights is to file an original bill in equity to have the judgment in such a suit set aside for fraud.[6]

tain the suit. McDonnell *v.* Grand Canal Co., 3 Ir. Ch. R. 578; Robson *v.* Dodd, L. R. 8 Eq 301.

[1] Filder *v.* London, etc., R. Co., 1 H. & Miller 489; Forrest *v.* Manchester, etc., Ry. Co., 4 DeG., F. & J. 126; Belmont *v.* Erie Ry. Co., 52 Barb. (N.Y.) 637; Beshoar *v.* Chappell, (Colo.), 40 Pac. R. 244. But see Dinsmore *v.* Central R. R. Co., 19 Fed. R. 153; Sandford *v.* Railroad, 24 Pa. St. 378; Central R. R. Co. *v.* Collins, 40 Ga. 582.

[2] DuPont *v.* Northern Pacific R. Co., 18 Fed. R. 467.

[3] Colman *v.* Eastern Counties R. Co., 10 Beav. 1.

[4] Ffooks *v.* London, etc., R. Co., 17 Jur. 365.

[5] Koehler *v.* Black River, etc., Co., 2 Black (U. S.) 715; Bayliss *v.* Lafayette, etc., R. Co., 8 Biss. (U. S.) 193; Mussina *v.* Goldthwaite, 34 Tex. 125; Graham *v.* Boston, etc., R. Co., 118 U. S. 161; Farmers' L. & T. Co. *v.* Toledo, etc., Ry. Co., 67 Fed. R. 49. A stockholder can not defend against a suit to foreclose a mortgage upon its property for default in the payment of interest upon the ground that the railroad company has misapplied its earnings in order to bring about the default, even where the majority stockholder is a heavy bondholder and desires the mortgage foreclosed. Farmers' Loan & T. Co. *v.* New York, etc., R. Co., 78 Hun 213, 28 N. Y. Supp. 933; Oelbermann *v.* New York, etc., R. Co., (Sup. Ct., 1894) 27 N.Y. Supp. 945.

[6] Blackman *v.* Central R. Co., 58 Ga. 189; Forbes *v.* Memphis, etc., R. Co., 2 Woods (U.S.) 323; Kelley *v.* Mississip-

§ 168. **Right to recover insurance.**—Where the corporation neglects to properly insure its property, it is held that a stockholder may insure it in his own name, and may, in case of loss, recover upon such a policy for a sum which will make up any deficiency in the amount of the company's insurance necessary to cover his interest.[1] But the corporation is generally held to be a legal entity separate and apart from the owners of its stock, even though all the stock belong to one person.[2] It would seem, therefore, that he can not insure as absolute owner of the property,[3] whatever may be the rule as to his qualified interest therein.

§ 169. **Other rights and remedies of stockholders.**—A stockholder may, in general, contract with the corporation upon the same terms, in the same manner, and to the same extent that another person may.[4] And it is held that he may be interested in the construction company to which a corporate contract is given, even though he owns a majority of the stock and thereby may have control.[5] But this right would seem to be held sub-

pi, etc., R. Co., 1 Fed. R. 564, holding that at common law a stockholder can not defend, even though the corporation is in no position to do so.

[1] Warren *v.* Davenport Fire Ins. Co., 31 Iowa 464; Riggs *v.* Commercial Mut. Ins. Co., 125 N. Y. 7. See, also, Seaman *v.* Enterprise Fire Ins. Co., 18 Fed. Rep. 250.

[2] Button *v.* Hoffman, 61 Wis. 20. See Hopkins *v.* Roseclare, etc., Co., 72 Ill. 373; Newton, etc., Co. *v.* White, 42 Ga. 148. But see Swift *v.* Smith, 65 Md. 428, where it is held that a person owning all the stock may bind the corporation by his individual acts.

[3] See Philips *v.* Knox, etc., Ins. Co., 20 Ohio 174; Riggs *v.* Commercial, etc., Ins. Co., 19 J. & S. (N. Y. Super. Ct.) 466.

[4] Hartford, etc., R. Co. *v.* Kennedy, 12 Conn. 499, 509; Central, etc., R. Co. *v.* Claghorn, 1 Speers Eq. (S. C.) 545, 562. It is held that stockholders of a corporation have the same right to purchase its property and take possession thereof that strangers would have, during the pendency of a suit to forfeit the charter. Havemeyer *v.* Superior Ct., 84 Cal. 327. See, also, Crymble *v.* Mulvaney, (Colo.), 40 Pac. R. 499; Merrick *v.* Peru Coal Co., 61 Ill. 472; Mickles *v.* Rochester City Bank, 11 Paige (N. Y.) 118, s. c. 42 Am. Dec. 103. Stockholders in a corporation may purchase its mortgage bonds and enforce payment in the usual manner, though the object in purchasing the bonds was to cause a foreclosure and to purchase the property at the sale. Farmers' Loan & T. Co. *v.* New York, etc., R. Co., 78 Hun (N. Y.) 213, s. c. 28 N. Y. Supp. 933. See, also, Oelbermann *v.* New York, etc., R. Co., 27 N. Y. Supp. 945.

[5] Porter *v.* Pittsburg, etc., Co., 120 U. S. 649, 670, holding that the mere

ject to the principle which is now firmly established, that where a majority of the stockholders assume control of the corporation, they take upon themselves the trust relation occupied by the corporation toward its stockholders,[1] and are bound to equity and fair dealing.[2] Upon this principle depends the well established right of a minority stockholder to have set aside a fraudulent sale of the corporate property, by the majority of the stockholders,[3] or by the directors,[4] to themselves, or a fraudulent sale of property to the corporation by them.[5] He may, in good faith, obtain security for his debt,[6] and may sue or be sued by the corporation both at law and in

fact of such ownership does not raise a legal inference that he dominates the board of directors.

[1] Ervin *v.* Oregon, R., etc., Co., 27 Fed. R. 625, s. c. 20 Fed. R. 577, (Irvin *v.*), 28 Fed. R. 833. See, also, Miner *v.* Belle Isle Ice Co., 93 Mich. 97, s. c. 17 L. R. A. 412.

[2] And a court of equity will review their action at the instance of the minority. Menier *v.* Hooper's Tel. Works, L. R. 9 Ch. 350; Meeker *v.* Winthrop, etc., Co., 17 Fed. R. 48. See Barr *v.* New York, etc., R. Co., 96 N. Y. 444.

[3] Reilly *v.* Oglebay, 25 W. Va. 36; Mason *v.* Pewabic Min. Co., 25 Fed. R. 882. A creditor of the old corporation who is injured thereby may have the sale set aside for fraud. San Francisco, etc., R. Co. *v.* Bee, 48 Cal. 398.

[4] Jones *v.* Arkansas, etc., Co., 38 Ark. 17; Buell *v.* Buckingham, 16 Iowa 284; Hoyle *v.* Plattsburgh, etc., R. Co., 54 N. Y. 314, setting aside a purchase by a director at a sale on execution. The director can hold property of the corporation which he may purchase only as a trustee for the corporation, and, on being repaid the purchase-money, he must make it over to his *cestui que trust*. Harts *v.* Brown, 77 Ill. 226; Munson *v.* Syracuse, etc., R. Co., 29 Hun 76, 103 N. Y. 58; Covington, etc., R. Co. *v.* Bowler's Ex'rs, 9 Bush (Ky.) 468, holding a purchaser from the director with notice, subject to the same liability as his vendor. But a sale to a syndicate of which a director is a member, if made in good faith and for an adequate price will not be set aside. DuPont *v.* Northern Pac. R. Co., 18 Fed. R. 467; Hill *v.* Nisbet, 100 Ind. 341. See Ashhurst's Appeal, 60 Pa. St. 290, where a sale to a director was upheld. But where the sale was made to the directors through "dummies" the corporate creditors can not have it set aside after the lapse of a long time, even though made for an inadequate price. Graham *v.* Railroad Co., 102 U. S. 148.

[5] Where a director fraudulently conveys land to the corporation, the stockholder should not sue in equity to dissolve the corporation on account of such sale, but his remedy is in an action by the corporation through its proper agents, or, in case they refuse to sue, then by the stockholder himself, to set aside the fraudulent sale. Tutwiler *v.* Tuscaloosa Coal, I. & L. Co., 89 Ala. 391, 7 So. 398.

[6] Reichwald *v.* Commercial Hotel

equity.[1] And in case of its insolvency he may be competent and qualified to act as its receiver or assignee.[2]

§ 170. **Stockholders as agents of the corporation.**—A stockholder can not, as such, bind the corporation by a contract made in its name,[3] although, of course, he may act as its agent by appointment.[4] And it is held that all the stockholders in meetings assembled can not, ordinarily, make a valid contract,[5] but that this power belongs to the directors or to agents acting under their authority.[6] Since he is not the corporation nor necessarily its agent, a stockholder's admissions will not bind it,[7] and service of process upon him is not service upon the corporation.[8]

Co., 106 Ill. 439; Foster *v.* Belcher's Sugar Refining Co., 118 Mo. 238, s. c. 24 S. W. R. 63.

[1] Waring *v.* Catawba Co., 2 Bay (S. C.) 109; *Ex parte* Booker, 18 Ark. 338; Sanborn *v.* Lefferts, 58 N. Y. 179; Leonard *v.* Spencer, 108 N. Y. 338: Wausau, etc., Co. *v.* Plumer, 35 Wis. 274. A stockholder may recover damages for an injury caused by the negligence or misconduct of the corporation. Morbach *v.* Home Min. Co., 53 Kan. 731, 37 Pac. R. 122.

[2] Covert *v.* Rogers, 38 Mich. 363; Matter of Bowery Bank, 16 How. Pr. 56. But a stockholder should be appointed only with the consent of the parties having opposing interests. Atkins *v.* Wabash, etc., R. Co., 29 Fed. R. 161. A corporate officer can not be a receiver in New Jersey. Freeholders *v.* *v.* State Bank, 28 N. J. Eq. 166.

[3] Morelock *v.* Westminster Water Co., (Md.) 4 Atl. Rep. 404; Mays *v.* Foster, 13 Ore. 214, 10 Pac. R. 17; Allemong *v.* Simmons, 124 Ind. 199 (where a stockholder and director owning most of the stock in a railroad company made a contract in its name which was held invalid). England *v.* Dearborn, 141 Mass. 590; Central Trust Co. *v.* Bridges, 57 Fed. R. 753.

[4] Spear *v.* Ladd, 11 Mass. 94. The rule has been held to be the same where he owns all the stock. Button *v.* Hoffman, 61 Wis. 20. But the contrary is held in Swift *v.* Smith, 65 Md. 428.

[5] Conro *v.* Port Henry, etc., Co., 12 Barb. 27; McCullough *v.* Moss, 5 Denio (N. Y.) 567; Gashwiler *v.* Willis, 33 Cal. 11; Gulf, etc., R. Co. *v.* Morris, 67 Tex. 692; Humphreys *v.* McKissock, 140 U. S. 304. See *post* §§ 236, 249, 252.

[6] 2 Cook on Stock and Stockholders, §712.

[7] Mitchell *v.* Rome R. Co., 17 Ga. 574, 586; Soper *v.* Buffalo, etc., R. Co., 19 Barb. (N. Y.) 310; Morrell *v.* Dixfield, 30 Me. 157; Fairfield, etc., Co. *v.* Thorp, 13 Conn. 173; Magill *v.* Kauffman, 4 Serg. & Rawle (Pa.) 317, 321. Excepting, of course, where he is acting as agent for the corporation by its athority in a matter which it has entrusted to him. Norwich, etc., R. Co. *v.* Cahill, 18 Conn. 484; American Fur Co. *v.* United States, 2 Pet. (U. S.) 358.

[8] Lillard *v.* Porter, 2 Head (Tenn.)

§ 171. **Notice to stockholder.**—Notice to an individual stockholder is not notice to the corporation.[1] A stockholder is not, ordinarily, chargeable with knowledge of corporate contracts,[2] or entries in the books of the corporation,[3] unless his relations are such as to render it reasonably probable that he had actual knowledge thereof. In the latter case, of course, actual knowledge may be inferred.[4] It has also been held that a stockholder is not chargeable with constructive notice of the corporate by-laws;[5] but this is certainly not the general rule.

§ 172. **Stockholders' right to inspect books.**—A stockholder is entitled to inspect the corporate books at reasonable intervals, either in person,[6] or by an expert or an agent, when he is too ignorant to do it himself intelligently.[7] The directors

177; DeWolf *v.* Mallett's Adm'r, 3 Dana (Ky.) 214.

[1] Union Canal Co. *v.* Loyd, 4 Watts & S. (Pa.) 393; Racine, etc., Co. *v.* Joliet, etc., Co., 27 Fed. R. 367. See, also, dissenting opinion in City of Logansport *v.* Justice, 74 Ind. 378, and authorities there cited.

[2] Tarbox *v.* Gorman, 31 Minn. 62; Baker *v.* Woolston, 27 Kan. 185, 189.

[3] Hill *v.* Manchester, etc., Co., 5 B. & Ad. 866; Rudd *v.* Robinson, 126 N. Y. 113. But see Hamilton, etc., Co. *v.* Iowa, etc., Co., 88 Iowa 364, 55 N. W. R. 496.

[4] See Bedford R. Co. *v.* Bowser, 48 Pa. St. 29. In Graff *v.* Pittsburgh, etc., R. Co., 31 Pa. St. 489, 495, the court holds a stockholder bound by an entry made while he was present and assenting to it. If he is also a director he is as fully chargeable with notice of entries in the books as a partner would be with entries in the partnership books. Montgomery *v.* Exchange Bank, (Pa.) 6 Atl. 133; First Nat. Bank *v.* Tisdale, 18 Hun 151; Aff'd 84 N. Y. 655. Between stockholders the books of the corporation control as to what it has done. Hubbell *v.* Meigs, 50 N. Y. 480. A stockholder is an integral part of the corporation to the extent that, in view of the law, he is privy to the proceedings touching the body of which he is a member. Hawkins *v.* Glenn, 131 U. S. 319; Lewis *v.* Glenn, 84 Va. 947.

[5] Pearsall *v.* Western U. Tel. Co., 44 Hun (N. Y.) 532, s. c. on appeal, 124 N. Y. 256. But see *post*, § 192, *contra*.

[6] Commonwealth *v.* Philadelphia, etc., R. Co., 3 Pa. Dist. R. 115; Deaderick *v.* Wilson, 8 Baxt. (Tenn.) 108; Angell & Ames on Corp. (8th ed.), § 681. The corporation can not refuse stockholders the right to inspect the transfer books simply because it would be inconvenient to grant it, nor because a by-law required the transfer books to be closed thirty days before an election. State, *ex rel.* Wilson, *v.* St. Louis & S. F. R. Co., 29 Mo. App. 301. See State *v.* Laughlin, 53 Mo. App. 542.

[7] Phœnix Iron Co. *v.* Commonwealth, 113 Pa. St. 563; State *v.* Bienville, etc., Co., 28 La. Ann. 204; Ellsworth *v.* Dorwart, (Iowa) 63 N. W. R. 588; People *v.* Nassau Ferry

can not exclude a member from this right because his motives in making the inspection are hostile to the interests of the corporation,[1] and he may enforce the right by *mandamus* if it is wrongfully denied.[2] The writ should be directed to the officer or person having the custody of the books.[3]

§ 173. Stockholder is disqualified to serve as judge or juror where corporation is interested.—A stockholder is incompetent to serve as a judge,[4] or juror,[5] in a case to which the cor-

Co., 33 N. Y. Supp. 244. Such a provision is contained in the statutes of nearly all of the states. Stimson's Am. Stat. Law (1892), §§ 8042, 8539. Under Wis. Rev. Stat., § 1757, which is similar to the statutes of most of the other states, it is held that a stockholder has the right to examine, not only the books containing the stock accounts, but those containing the general accounts. State *v.* Bergenthal, 72 Wis. 314.

[1] State, *ex rel.* Spinney, *v.* Sportsman's, etc., Ass'n, 29 Mo. App. 326; People *v.* Throop, 12 Wend (N. Y.) 183; Commonwealth *v.* Phœnix Iron Co., 105 Pa. St. 111, s. c. 51 Am. R. 184; Regina *v.* Wilts, etc., Canal Navigation Co., 29 L. T. R. (N. S.) 922, where the shareholder was an attorney, who sought to make the inspection in the interest of his clients, who were in litigation with the company. But see State, *ex rel.* Rosenfeld, *v.* Einstein, 46 N. J. L. 479; People *v.* Walker, 9 Mich. 328; Lyon *v.* American Screw Co., 16 R. I. 472, 17 Atl. R. 61; People *v.* Northern Pac. R. Co., 18 Fed. R. 471. Nor does the fact that he requests to see some of the books, which he is not entitled to see, justify a refusal to permit him to inspect those which he is entitled to see. Ellsworth *v.* Dorwart, (Iowa) 63 N. W. R. 588.

[2] People *v.* Lake Shore, etc., R. Co., 11 Hun 1; People *v.* Pacific, etc., Co., 50 Barb. (N. Y.) 280; Commonwealth *v.* Phœnix Iron Co., 105 Pa. St. 111; Cockburn *v.* Union Bank, 13 La. Ann. 289; Merrill on Mandamus, § 161. A stockholder of a private corporation, or his attorney in fact, has a right to inspect the books and records of a corporation at any reasonable time, without giving a reason therefor. His remedy is mandamus. Foster *v.* White, 86 Ala. 467, 6 Ry. & Corp. L. J. 88. *Contra*, Investment Co. *v.* Eldridge, 2 Pa. Dist. R. 394. But the refusal of such right by the secretary is not of itself ground for damages against the corporation. Legendre *v.* New Orleans, etc., Ass'n, 45 La. Ann. 669.

[3] People *v.* Throop, 12 Wend. (N. Y.) 183; State *v.* Bergenthal, 72 Wis. 314; People *v.* Mott, 1 How. Pr. (N. Y.) 247.

[4] Dimes *v.* Prop. of Grand Junction Canal, 3 H. of. L. Cas. 759; Peninsular R. Co. *v.* Howard, 20 Mich. 18; Cregin *v.* Brooklyn, etc., R. Co., 19 Hun (N. Y.) 349. But relationship to a stockholder does not disqualify. Searsburgh Turn. Co. *v.* Cutler, 6 Vt. 315; Butler *v.* Glens, etc., R. Co., 121 N. Y. 112.

[5] Page *v.* Contoocook Valley R. Co., 21 N. H. 438; Peninsular R. Co. *v.* Howard, 20 Mich. 18; Georgia Railroad *v.* Hart, 60 Ga. 550, where a stockholder's son was also held incompetent. See 2 Elliott's Gen. Pr., § 518.

poration is a party, and, at common law, is incompetent to testify as a witness in such a case.[1] But many of the states have statutes rendering interested parties competent as witnesses, and in other states this last rule may usually be evaded by a transfer of the shareholder's stock.[2] A *bona fide* transfer of the stock before the commencement of the suit has been held sufficient, although "the debt sued for existed at the time of the transfer, and continued to exist until the suit was brought."[3]

§ 174. **Unlawful combinations and conspiracies to vote or prevent voting—Injunction.**—Where a fraudulent purpose to vote stock in a particular way, and thereby to control the election to the irreparable and permanent injury of the corporation or of other stockholders is shown,[4] or where a conspiracy to control the election by qualifying others to vote stock which the owner is not authorized to vote;[5] or by excluding the votes of certain stockholders[6] is shown; or where a rival corporation has obtained control of stock by *ultra vires* act, and seeks to vote it to the injury of the company's interests,[7] an

[1] Porter *v.* Bank of Rutland, 19 Vt. 410; Delaware, etc., R. Co. *v.* Irick, 23 N. J. L. 321; Rapalje on Witnesses, § 77.

[2] 1 Cook on Stock and Stockholders, § 11.

[3] Rapalje on Witnesses, § 77, citing Smith *v.* Tallassee, etc., Co., 30 Ala. 650; Illinois Mutual Fire Ins. Co. *v.* Marseilles, etc., Co., 6 Ill. 236; Utica Ins. Co. *v.* Cadwell, 3 Wend. (N. Y.) 296; Union Bank *v.* Owen, 4 Humph. (Tenn.) 338.

[4] Reed *v.* Jones, 6 Wis. 680. Ordinarily, however, the purpose or motive of the shareholder is immaterial if he does no illegal act.

[5] Webb *v.* Ridgely, 38 Md. 364, where the charter permitted a single stockholder to vote only twenty shares. But though a court of equity may do so, the corporation can not question the holder's right to vote because the shares were transferred to him by one who owned a greater number of shares than any one person is permitted to vote. *In re* Stranton, etc., Co., L. R. 16 Eq. 559; State *v.* Smith, 48 Vt. 266; People *v.* Kip, 4 Cowen 382, note. See *ante*, § 157.

[6] Camden, etc., R. Co. *v.* Elkins, 37 N. J. Eq. 273; People *v.* Albany, etc., R. Co., 55 Barb. (N. Y.) 344, where it is held that the inspectors may be enjoined from receiving the votes of certain stockholders until the votes of others have been deposited. Hafer *v.* New York, etc., R. Co., (Cincinnati Super. Ct.) 14 Week. Law Bul. 68.

[7] Memphis, etc., R. Co. *v.* Woods, 88 Ala. 630, s. c. 7 L. R. A. 605, where the rival company owned a majority of the stock and had elected its own directors to serve as directors of the company in which plaintiffs were interested, who used their power against the interests of that road, the

injunction may issue to restrain the holding of an election until further order of the court,[1] or to restrain the offending stockholder or his agents from voting his stock,[2] or a particular portion of it,[3] either altogether, or until the petitioner's rights have been protected.[4] But an injunction will not issue to prevent stockholders holding large interests from gaining control of the corporation, by legal means, because they will probably misuse their power.[5] Nor can the right to vote be denied because of the alleged wrongful motives of the holder in buying his stock.[6] And it is perfectly competent for stockholders owning a majority of the stock to combine and elect a board of directors,[7] if the combination is formed without fraud.[8] Where the application for an injunction is not made a sufficient number of days before the election to afford the defendants an opportunity to be heard, it may, as a rule, be summarily dismissed.[9] But where the persons sought to be enjoined can have no legal right to vote any stock they own, or in the case of a railroad owning stock in a rival corporation, there may be reason for issuing an injunction restraining them.[10] And, in a proper case, the court may order that an election shall be temporarily

defendant company and all persons representing it were enjoined from voting the shares of stock which it held. *Ante*, § 159. See, also, Milbank *v.* New York, etc., R. Co., 64 How. Pr. (N. Y.) 20; George *v.* Central R., etc., Co., 101 Ala. 607, 14 So. R. 752.

[1] People *v.* Albany, etc., R. Co., 55 Barb. (N. Y.) 344. But an injunction forbidding the holding of an election at all is void.

[2] Memphis, etc., R. Co. *v.* Woods, 88 Ala. 630, s. c. 7 L. R. A. 605.

[3] Reed *v.* Jones, 6 Wis. 680; Webb *v.* Ridgely, 38 Md. 364.

[4] Brown *v.* Pacific Mail, etc., Co., 5 Blatch. (U. S.) 525, where the defendants were enjoined from participating in any election unless plaintiffs' votes were received thereat.

[5] Camden, etc., R. Co. *v.* Elkins, 37 N. J. Eq. 273. One stockholder can do nothing to control or direct the vote of another stockholder. Ryder *v.* Alton, etc., R. Co., 13 Ill. 516.

[6] Pender *v.* Lushington, L. R. 6 Ch. D. 70. Parties who are interested in opposition to a corporation have the right to purchase its stock in order to defeat a contract which it is about to make. Carson *v.* Iowa City Gaslight Co., 80 Iowa 638, 45 N. W. R. 1068.

[7] Havemeyer *v.* Havemeyer, 86 N. Y. 618, Aff'g 43 N.Y. Super. Ct. 506; Faulds *v.* Yates, 57 Ill. 416.

[8] People *v.* Albany, etc., R. Co., 55 Barb. (N. Y.) 344.

[9] Hilles *v.* Parrish, 14 N. J. Eq. 380.

[10] Memphis, etc., R. Co. *v.* Woods, 88 Ala. 630.

postponed,[1] though an order that it should never be held would be erroneous.[2] An injunction directed against the voting of particular stock may cause what would otherwise be the minority to become the majority, and so change the result, but it will not prevent the holding of the election.[3] A stockholder may also enjoin the directors from interfering with and postponing an annual election and thereby extending their term.[4] Further than the right to vote in the management of corporate affairs, the stockholder has not, during the continuance of the corporation, any direct legal interest in its property.[5]

§ 175. **Liability of stockholders for unpaid subscription.**— A stockholder is, of course, liable to the corporation for any unpaid balance due on the shares for which he has subscribed, and this liability may be enforced in a proper case by suit in the name of the corporation, or in equity at the suit of any corporate creditor who is injured by its non-payment, upon the insolvency and winding up of the corporation.[6] And one who subscribes or takes part as a stockholder after the corporation is formed is estopped to deny that it is legally incorporated, although some of the statutory formalities may not have been

[1] People *v.* Albany, etc., R. Co., 55 Barb. (N.Y.) 344; Scholfield *v.* Union Bank, 2 Cr. C. C. (U. S.) 115.

[2] People *v.* Albany, etc., R. Co., 55 Barb. (N. Y.) 344.

[3] Brown *v.* Pacific Mail, etc., Co., 5 Blatch. (U. S.) 525.

[4] Elkins *v.* Camden, etc., R. Co., 36 N. J. Eq. 467.

[5] Jones *v.* Terre Haute, etc., R. Co., 57 N. Y. 196; Granger *v.* Bassett, 98 Mass. 462; Goodwin *v.* Hardy, 57 Me. 143; Burroughs *v.* N. C. R. R. Co., 67 N. C. 376; Curry *v.* Woodward, 44 Ala. 305; Phelps *v.* Farmers', etc., Bank, 26 Conn. 269; Lockhart *v.* Van Alstyne, 31 Mich. 76, 78; Humphreys *v.* McKessock, 140 U. S., 304 S.C., 11 Sup. Ct. R. 779.

[6] The courts of America generally hold that the capital stock of a corporation, and especially the unpaid subscriptions, constitute a trust fund for the benefit of the creditors of the corporation. Note to Thompson *v.* Reno Sav. Bank, 3 Am. St. R. 797, 808, *et seq.*; Cook on Stock and Stockholders, § 199. *Ante*, §§ 90, 110. Where a consolidation between two corporations is effected under a law providing that all the property, rights of action and other interests of the consolidating companies shall rest in and become the property of the consoldated corporation, and provides that stock of the new corporation shall be issued in exchange for the stock of the corporations merged, a subscription to the stock of one of the old corporations becomes assets for the payment of the debts of the new corporation. Hamilton *v.* Clarion, etc., R. Co., 144 Pa. St. 34.

complied with.[1] But one who merely subscribes to a preliminary agreement to take stock after the corporation is formed is usually entitled to insist upon the regular organization of a legal corporation, and if he does not by subsequent acts acquiesce in the mode of incorporation, recognize it as a legal corporation or in any way act as a stockholder, he is not estopped to deny his liability as such, where the incorporation is defective and invalid.[2] Ordinarily, subscriptions are required to be paid in money; but where the state law allows subscriptions to be paid in property, the transfer of property in payment of shares made in good faith at an honest valuation entitles the owner to hold his shares as fully paid up even against creditors of the corporation in the event of its insolvency.[3] So, it is held that a *bona fide* purchaser of stock in open market, where the certificate, on its face, purports to be fully paid up and non-assessable, is not liable for assessments, although, in fact, it was not fully paid.[4] An unpaid subscription may be collected in

[1] Thompson *v.* Reno Sav. Bank, 19 Nev. 103, s. c. 3 Am. St. R. 797, and note; Cravens *v.* Eagle Cotton Mills, 120 Ind. 6, s. c. 16 Am. St. R. 298; Dutchess, etc., Co. *v.* Davis, 14 Johns. (N. Y.) 238, s. c. 7 Am. Dec. 459; Hickling *v.* Wilson, 104 Ill. 54; Casey *v.* Galli, 94 U. S. 673; Clarke *v.* Thomas, 34 Ohio St. 46; Hamilton *v.* Clarion, etc., Co., 144 Pa. St. 34, 23 Atl. R. 53; Upton *v.* Hansbrough, 3 Biss. (U. S.) 417; Anderson *v.* Newcastle, etc., R. R. Co., 12 Ind. 376, s. c. 74 Am. Dec. 218; Slocum *v.* Warren, 10 R. I. 112 and 116; Chubb *v.* Upton, 95 U. S. 665; 1 Cook on Stock and Stockholders, §§ 184, 185; Taylor Priv. Corp., § 738.

[2] Dorris *v.* Sweeney, 60 N. Y. 463; Reed *v.* Richmond St. R. R. Co., 50 Ind. 342; Indianapolis, etc., Co. *v.* Herkimer, 46 Ind. 142; Capps & McCreary *v.* Hastings, etc., Co., 40 Neb. 470, 24 L. R. A. 259; Fairview, etc., Co. *v.* Spillman, 23 Ore. 587; Richmond Factory Ass'n *v.* Clarke, 61 Me. 351; Taggart *v.* Western Md. R. R. Co., 24 Md. 563; note to Parker *v.* Thomas, 81 Am. Dec. 392; 1 Morawetz Priv. Corp., § 49.

[3] Grant *v.* East. & West. R. Co., etc., 54 Fed. R. 569. *Ante*, § 91. Where the property was transferred to the corporation at an overvaluation and accepted by a board of directors chosen by the votes of the subcribers, it was held that the pretended payment for the stock subscribed was fraudulent, and that the subscriber could be compelled to pay the difference between the actual value of the property and the par value of the stock. Lloyd *v.* Preston, 146 U. S. 630. See, also, Boulton Carbon Co. *v.* Mills, 78 Iowa 460, s. c. 5 L. R. A. 649.

[4] Rood *v.* Whorton, 67 Fed. R. 434, and authorities there cited; Handley *v.* Stutz, 139 U. S. 417, s. c. 11 Sup. Ct. R. 530; Young *v.* Erie Iron Co., 65 Mich. 111, s. c. 31 N. W. R. 814. See, also, Hospes *v.* Northwestern, etc., Co., 48 Minn. 174, s. c. 15 L. R. A. 470; First Nat. Bank *v.* Gustin, etc., Co., 42

payment of damages for a tort the same as for a contract debt.[1]

§ 176. **Release of stockholder—Withdrawal.**—This liability is one from which the stockholder can not claim release after the corporation has become insolvent, in cases where such release was not legally ascertained and established before such insolvency.[2] And he can only be released from a liability not induced by fraud on the part of the corporation by the unanimous consent, express or implied,[3] of all the other stockholders.[4] Even a majority of the stockholders can not withdraw and refuse to proceed.[5] A cancellation of the subscription, even where made with the unanimous consent of the other stockholders, may be impeached and set aside, in a proper case, by

Minn. 327, s. c. 6 L. R. A. 676. But compare Howe *v.* Illinois, etc., Works, 46 Ill. App. 85.

[1] Powell *v.* Oregonian Railway, 36 Fed. R. 726, 38 Fed. R. 187; Grindle *v.* Stone, 78 Me. 176, s. c. 4 East. R. 623.

[2] He can not then rescind his contract of subscription for fraud of the company's agents in obtaining it. Kent *v.* Freehold, etc., Co., L. R. 3 Ch. App. 493; Turner *v.* Grangers', etc., Ins. Co., 65 Ga. 649; Ruggles *v.* Brock, 6 Hun (N. Y.) 164; Saffold *v.* Barnes, 39 Miss. 399; Duffield *v.* Barnum, etc., Works, 64 Mich. 293, s. c. 31 N. W. 310; Chubb *v.* Upton, 95 U. S. 665; Farrar *v.* Walker, 13 Nat. Bankr. Reg. 82. And the company can not agree to a rescission to the detriment of the creditors' interests. Vick *v.* La Rochelle, 57 Miss. 602; Gill *v.* Balis, 72 Mo. 424; Zirkel *v.* Joliet, etc., Co., 79 Ill. 334; Burke *v.* Smith, 16 Wall. (U. S.) 390.

[3] Knowledge and acquiesence for years will bind a stockholder who did not know of the release before it was effected. Evans *v.* Smallcombe, L. R. 3 H. L. 249; Stuart *v.* Valley R. Co., 32 Gratt. (Va.) 146. Retaining and using benefits arising from a cancellation of the subscription will prevent the corporation and the stockholders from objecting to the release. Miller *v.* Second, etc., Ass'n, 50 Pa. St. 32.

[4] Lake Ontario etc., R. Co. *v.* Mason, 16 N. Y. 451, 463; Gulf Coast, etc., R. Co. *v.* Neely, 64 Tex. 344; Selma, etc., R. Co. *v.* Tipton, 5 Ala. (N. S.) 787; Garrett *v.* Dillsburg, etc., R. Co., 78 Pa. St. 465; Miller *v.* Hanover, etc., R. R. Co., 87 Pa. St. 95, s. c. 30 Am. R. 349; Johnson *v.* Wabash, etc., R. R. Co., 16 Ind. 389; Pacific Fruit Co. *v.* Coon, (Cal.) 40 Pac. R. 542.

[5] Busey *v.* Hooper, 35 Md. 15. A tender of payment for stock and refusal on the part of the corporate officers to accept the same is no defense in an action by corporate creditors for the unpaid balance due on such stock, after the corporation has become insolvent, where the subscriber continued an active member of the corporation after such tender and refusal. Potts *v.* Wallace, 146 U. S. 689.

any corporate creditor injured thereby.[1] Any attempt on the part of the corporation to release a subscriber from liability will be subjected to rigid scrutiny by a court of equity, at the instance of corporate creditors,[2] and will only be upheld where the release is fairly and honestly made for a valuable consideration.[3] Neither the board of directors of the corporation,[4] nor any officer,[5] has power to agree with a subscriber that his subscription shall be cancelled, unless such power is given by charter or statute, or by the by-laws of the company; and entries caused by them to be made in the books of the company showing a release will be disregarded.[6] The money refunded for calls paid before such an attempted release may be recovered at the suit of any stockholder, by a bill in equity, and

[1] Vick *v.* La Rochelle, 57 Miss. 602; Farnsworth *v.* Robbins, 36 Minn. 369, s. c. 31 N. W. 349; Appeal of Miller, 1 Pennypacker (Pa. Sup. Ct.) 120; 2 Thomp. Corp., §§ 15, 17. But in England it is held the creditor can obtain nothing but what the company is entitled to get from the shareholders. *In re* Dronfield, etc., Co., L. R. 17 Ch. Div. 76.

[2] Sawyer *v.* Hoag, 17 Wall. (U. S.) 610; County of Morgan *v.* Allen, 103 U. S. 498; Putnam *v.* City of New Albany, 4 Biss. (U. S.) 365; Upton *v.* Hansbrough, 3 Biss. (U. S.) 417, 425; *In re* South Mountain, etc., Mining Co., 7 Sawyer (U. S.) 30; Union Ins. Co. *v.* Frear, etc., Co., 97 Ill. 537; Thompson *v.* Meisser, 108 Ill. 359; Chisholm *v.* Forny, 65 Iowa 333; Goodwin *v.* McGehee, 15 Ala. 232; Gill *v.* Balis, 72 Mo. 424.

[3] This is the rule in the federal courts. New Albany *v.* Burke, 11 Wall. (U. S.) 96; Burke *v.* Smith, 16 Wall. (U. S.) 390; Potts *v.* Wallace, 146 U. S. 689. And is followed in the Illinois courts. Zirkel *v.* Joliet, etc., Co., 79 Ill. 334.

[4] Bedford R. Co. *v.* Bowser, 48 Pa. St. 29; Ryder *v.* Alton, etc., R. Co., 13 Ill. 516; Jewett *v.* Valley R. Co., 34 Ohio St. 601; White Mts. R. Co. *v.* Eastman, 34 N. H. 124; Tuckerman *v.* Brown, 33 N. Y. 297; Rider *v.* Morrison, 54 Md. 429; Lafayette, etc., Corp. *v.* Ryland, 80 Wis. 29, 49 N. W. R. 157; *In re* London, etc., Co., L. R. 5 Ch. Div. 525; Thomas' Case, L. R. 13 Eq. 437.

[5] Cartmell's Case, L. R. 9 Ch. 691.

[6] The general manager of a corporation, who is also its largest stockholder, secretary and treasurer, can not release a stockholder from his contract by charging off balance due on the books for unpaid calls and crediting sums already paid, where no attempt is made to transfer the shares, although the manager secures new subscriptions as substitutes therefor, and both parties at the time believe that he has authority to release old contracts and substitute new ones; and the fact that an over-issue of stock will result on account of the new subscriptions unless there is a cancellation of earlier subscriptions, will not justify such invalid cancellation. Cartwright *v.* Dickinson, 88 Tenn. 476, 12 S. W. 1030, 7 L. R. A. 706.

the subscriber's liability upon his cancelled subscription may be established.[1] If loss accrues to the corporation by reason of the improper cancellation of a subscription by the directors, they may be held personally liable for such loss.[2]

§ 177. **Compromises with stockholder.**—But the corporate authorities may compromise a subscription debt, as they may other debts, if there be a reasonable doubt as to the liability of the subscriber,[3] or if he be insolvent,[4] where it is done in good faith. If there be no real controversy, the compromise will not be binding.[5] It has been held, however, that where a subscriber fails to pay his subscription or to act as a stockholder, the corporation may treat his subscription as abandoned and permit others to fill it.[6] It has also been held that one subscription may be substituted for another upon request of the parties where a regular transfer of shares is not yet possible.[7]

§ 178. **Liability where stock is transferred.**—An original subscriber can not, however, by a transfer of his stock, dis-

[1] Melvin *v.* Lamar Ins. Co., 80 Ill. 446; South Bend Toy, etc., Co. *v.* Pierre, etc., Ins. Co., 4 S. Dak. 173, 56 N. W. R. 98. A secret agreement by which the officers of the corporation agree that the subscriber shall not be compelled to pay for his subscription, but shall be permitted to withdraw when he chooses, is invalid and does not affect the subscription nor the subscriber's liability. Great Western Tel. Co. *v.* Haight, 49 Ill. App. 633.

[2] Bank of St. Mary's *v.* St. John, 25 Ala. 566; Hodgkinson *v.* Nat'l, etc., Co., 26 Beav. 473. It seems that the subscriber may set up this fact as a defense. Southern Hotel Co. *v.* Newman, 30 Mo. 118.

[3] Bath's Case L. R. 8 Ch. Div. 334; Lord Belhaven's Case, 3 DeG., J. & S. 41. See Whitaker *v.* Grummond, 68 Mich. 249. s. c. 36 N. W. 62; New Albany *v.* Burke, 11 Wall. (U. S.) 96.

[4] Philadelphia, etc., R. Co. *v.* Hickman, 28 Pa. St. 318. A receiver can not be empowered by a court of equity to compromise a subscription, unless all the subscribers are parties to the suit in connection with which he is appointed. Chandler *v.* Brown, 77 Ill. 333.

[5] Phosphate, etc., Co. *v.* Green, L. R. 7 C. P. 43; Spackman *v.* Evans, L. R. 3 H. L. 171, 188, 231; Livingstone *v.* Temperance, etc., Society, 17 Ont. App. 379, s. c. 31 Am & Eng. Corp. Cas. 541.

[6] Perkins *v.* Union, etc., Co., 12 Allen (Mass.) 273. See, also, 2 Thomp. Corp., §§ 1530, 1535.

[7] To make a valid substitution, the signature of the first subscriber must be erased and that of his substitute inserted. Ryder *v.* Alton, etc., R. Co., 13 Ill. 516. See, also, 1 Cook on Stock and Stockholders, § 62, and compare Cartwright *v.* Dickinson, 88 Tenn. 476, 12 S. W. Rep. 1030; Hawkins *v.*

charge himself from liability for unpaid installments without the consent of the corporation; and where he does transfer on the books of the company as required by its by-laws, a receiver of the company, or assignee in bankruptcy, on its becoming insolvent, may recover from him the unpaid installments already due.[1] But, as a general rule, in most jurisdictions, upon a valid transfer, duly registered, the transferee succeeds to all the rights and liabilities of the transferer, and becomes liable in his place for future calls and indebtedness.[2] If the transfer is not registered, the transferer will usually continue liable, both to the corporation and to its creditors.[3]

§ 179. **When creditors may enforce unpaid subscriptions—Judgment and execution against corporation.**—Subscriptions to the capital stock of railroad corporations are most commonly disputed when an attempt is made to call them in to liquidate claims after corporate insolvency has occurred.[4] Under such circumstances, it is the practice of the courts to rigidly enforce the payment of the unpaid subscriptions for the accumulation of a fund with which to pay corporate debts. But these unpaid subscription balances are not the primary fund for the payment of corporate liabilities.[5] The corporate property must

Mansfield, etc., Co., 52 Cal. 513; Coleman *v.* Spencer, 5 Blackf. (Ind.) 197.

[1] Hood *v.* McNaughton, 54 N. J. Law 425; Upton *v.* Tribilcock, 91 U. S. 45. Some cases hold that a stockholder can not by transferring his stock relieve himself from liability for debts already accrued. Voight *v.* Dregge, 97 Mich. 322; Glenn *v.* Hunt, 120 Mo. 330, 25 S.W. Rep. 181; Nenney *v.* Waddill, 6 Tex. Civ. App. 244, 25 S. W. Rep. 308; Commercial Nat. Bk. *v.* Gibson, 37 Neb. 750. Others hold that he is relieved of such liability unless the transfer was fraudulently made to an insolvent purchaser for the purpose of escaping liability. Van Demark *v.* Barons, 52 Kan. 779; Close *v.* Brady, 24 N. Y. Supp. 567, 4 Misc. R. 474.

[2] Webster *v.* Upton, 91 U. S. 65, 70; Hartford & N. H. R. R. Co. *v.* Boorman, 12 Conn. 530; Tucker *v.* Gilman, 121 N. Y. 189; Angell & Ames on Corp., § 534; Taylor Priv. Corp., §§ 586, 587, 747; 1 Beach. Priv. Corp., § 126.

[3] Richmond *v.* Irons, 121 U. S. 27; Dane *v.* Young, 61 Me. 160; Shellington *v.* Howland, 53 N. Y. 371; Plumb *v.* Bank, 48 Kan. 484; Kellogg *v.* Stockwell, 75 Ill. 68; Bell's Appeal, 115 Pa. St. 88.

[4] 1 Cook on Stock and Stockholders, § 166.

[5] 1 Cook on Stock and Stockholders, § 200. A stockholder can not set off his claim as a creditor against his liability as a stockholder, but must share with the other creditors, as he is not

first be exhausted, or it must be made to appear that such property is so inadequate for the payment of corporate debts as to establish insolvency,[1] before a creditor is permitted to resort to them. The general rule in most jurisdictions is that a creditor's suit to enforce payment of unpaid subscriptions can be maintained only after a judgment at law has been obtained against the corporation and an execution issued thereon has been returned unsatisfied.[2] This remedy, however, need not

ordinarily liable in excess of his obligation to pay in full for his stock. Boulton Carbon Co. *v.* Mills, 78 Iowa 460, 6 Ry. & Corp. L. J. 417; Tama Water Power Co. *v.* Hopkins, 79 Iowa 653. The liability of a stockholder should not be enforced on a judgment against a corporation, where there are other judgment debtors whose property subject to execution could satisfy the judgment. Burch *v.* Taylor, 1 Wash. 245, 24 Pac. Rep. 438. An attachment against a corporation can not be levied on the individual property of natural persons composing it. State *v.* Marshall, 69 Miss. 486.

[1] Terry *v.* Tubman, 92 U. S. 156; Hedges *v.* Silver Hill, etc., Co., 9 Ore. 200; Samainego *v.* Stiles, 20 Pac. Rep. (Ariz.) 607; First Nat. Bank *v.* Greene, 64 Iowa 445; Cleveland *v.* Marine Bank, 17 Wis. 545. Corporate bankruptcy has been held sufficient evidence of the inability of the corporation to pay a corporate debt to justify an action by creditors to enforce subscriptions. State Savings Assn. *v.* Kellogg, 52 Mo. 583; Shellington *v.* Howland, 53 N. Y. 371; Terry *v.* Anderson, 95 U. S. 628, 636.

[2] Terry *v.* Anderson, 95 U. S. 628, 636; Walser *v.* Seligman, 21 Blatch. (U. S.) 130; Bank, etc., *v.* Dallam, 4 Dana (Ky.) 574; Wetherbee *v.* Baker, 35 N. J. Eq. 501; Cutright *v.* Stanford, 81 Ill. 240; Freeland *v.* McCullough, 1 Denio. (N. Y.) 414; Cleveland *v.* Burnham, 55 Wis. 598; Baxter *v.* Moses, 77 Me. 465; note to Thompson *v.* Reno Sav. Bank, 3 Am. St. Rep. 797, 814. This should be a personal judgment pronounced by the courts of state in which the corporation exists. Patterson *v.* Lynde, 112 Ill. 196; Bayliss *v.* Swift, 40 Iowa 648, Rocky Mt., etc., Bank *v.* Bliss, 89 N. Y. 338; Murray *v.* Vanderbilt, 39 Barb. (N. Y.) 140, 147; Barclay *v.* Talman, 4 Edw. Chan. (N. Y.) 123; Bank, etc., *v.* Adams, 1 Pars. Eq. (Penn.) 534. Some states by statute require the remedy against the corporation to be exhausted before resort is had to the property of the stockholders. Stimson's Am. Stat. (1892), § 8143, citing statutes of Maine, Pennsylvania, Iowa, Minnesota, Kansas, Maryland, Missouri, Texas, Florida. Only a judgment and an unsatisfied execution exhausts the legal remedy. Rocky Mountain Nat. Bk. *v.* Bliss, 89 N. Y. 338; Brice *v.* Munro, 5 Can. L. T. (Ont.) 130. See, also, Priest *v.* Essex, etc., Co., 115 Mass. 380; Shellington *v.* Howland, 53 N. Y. 371; Dauchy *v.* Brown, 24 Vt. 197; Wehrman *v.* Reakirt, 1 Cin. Super. Ct. 230; Thornton *v.* Lane, 11 Ga. 459; New England, etc., Bank *v.* Newport Steam Factory, 6 R. I. 154. *Contra*, in Marion, etc., Co. *v.* Norris, 37 Ind. 424; Shafer *v.* Moriarty,

be pursued where the corporation has formally dissolved,[1] and has no funds with which to pay the corporate debts.[2] And the unpaid subscription in such a case may be reached by the general creditors, although the corporate property, rights, privileges and franchises are covered by mortgage to secure another creditor.[3]

§ 180. **Effect as against stockholder of judgment against the corporation.**—Such a judgment, where the court has jurisdiction, is generally held conclusive against the stockholders as to the validity and amount of the creditor's claim, unless impeached for fraud or collusion.[4] And it was held in a recent case, where the plaintiff had recovered a judgment against the corporation in an action for damages for waste, that a judgment against a corporation for the recovery of money is conclusive evidence, in a suit against a stockholder for the collection of said judgment, of the existence of the corporation and its liability to plaintiff therein as thereby determined; and such judgment, whether given in an action *ex contractu* or

46 Ind. 9; Sleeper *v.* Goodwin, 67 Wis. 577; Bird *v.* Calvert, 22 S. Car. 292.

[1] Kincaid *v.* Dwinelle, 59 N. Y. 548. See Remington *v.* Samana Bay Co., 140 Mass. 494, to the effect that a judgment against a corporation, recovered after the corporation has been dissolved, is void; and see authorities cited in 23 Am. & Eng. Ency. of Law 887.

[2] Creditors will not be required to await the collection of doubtful claims or claims in litigation. The stockholders must pay promptly, and take upon themselves the *onus* of delay and risk as to all such cases. Moses *v.* Ocoee Bank, 1 Lea. (Tenn.) 398, 413; Stark *v.* Burke, 9 La. Ann. 341, 343. But see Younglove *v.* Kelly, etc., Co., 49 Ohio St. 663, 33 N. E. Rep. 234.

[3] Dean *v.* Biggs, 25 Hun (N. Y.) 122.

[4] Powell *v.* Oregonian R. Co., 36 Fed. R. 726; Wilson *v.* Pittsburgh, etc., Coal Co., 43 Pa. St. 424; Henry *v.* Vermillion, etc., R. R. Co., 17 Ohio 187; Milliken *v.* Whitehouse, 49 Me. 527; Hampson *v.* Weare, 4 Iowa 13; Grund *v.* Tucker, 5 Kan. 70; Hawes *v.* Anglo-Saxon Petroleum Co., 101 Mass. 385; Marsh *v.* Burroughs, 1 Woods, (U. S.) 463; Bissit *v.* Kentucky River Nav. Co., 15 Fed. R. 353, and note 360. See, also, Hawkins *v.* Glenn, 131 U. S. 319, s. c. 9 Sup. Ct. R. 739; Glenn *v.* Liggett, 135 U. S. 533, s. c. 10 Sup. Ct. R. 867; Conklin *v.* Furman, 8 Abb. Pr. N.S. (N.Y.) 161; Slee *v.* Bloom, 20 Johns. (N.Y.) 669; Stephens *v.* Fox, 83 N. Y. 313. The last of the cases hold that it is sufficient evidence of these facts where not disproved. This doctrine has been denied in New York. Slee *v.* Bloom, 5 Johns. Ch. (N. Y.) 366, reversed in 20 Johns.

ex delicto, is an indebtedness of the corporation, for which a stockholder is liable to the amount due on his stock.[1] But in some jurisdictions the stockholder is permitted to disprove the claim when a judgment is sought to be enforced against him,[2] and the judgment amounts only to *prima facie* evidence,[3] of the creditor's right to money due the corporation for subscriptions. It has also been held that a judgment against a corporation is merely a step to fix the liability of stockholders, and does not merge it or stand in the way of any discovery or relief which would otherwise be proper to enforce that liability.[4]

§ 181. **Stockholder's defense.**—The stockholders may be admitted to defend a suit brought against the corporation for the purpose of charging them on their individual liability, and the court will, in a proper case, relieve the corporation from a default and permit them to carry on the litigation.[5] Of course, the judgment does not even tend to prove that the per-

669, *supra*. Moss *v.* McCullough, 5 Hill (N. Y.) 131, reversed 7 Barb. (N. Y.) 279; Strong *v.* Wheaton, 38 Barb. (N. Y.) 616; Miller *v.* White, 50 N. Y. 137; McMahon *v.* Macy, 51 N. Y. 155. But this point did not properly arise in the last two cases, and Strong *v.* Wheaton professes to be based on the authority of 5 Hill 131, *supra*.

[1] Powell *v.* Oregonian R. Co.,6 Ry. & Corp. L. J. 28, 38 Fed. R. 187 A *judgment* on a claim for damages for waste becomes an indebtedness of the corporation, whether the *claim* for damages was an "indebtedness" under the Oregon constitution or not; and the stockholder is liable for such debt to the extent of the amount unpaid on his stock. Powell *v.* Oregonian R. Co. (C. C. D. Or.) 36 Fed. R. 726, 3 L. R. A. 201.

[2] Quick *v.* Lemon, 105 Ill.578; Hawes *v.* Anglo Saxon, etc., Co., 101 Mass. 385; Merchants' Bank *v.* Chandler, 19 Wis. 434; Grund *v.* Tucker, 5 Kan. 70; Grand Rapids Sav. Bank *v.* Warren, 52 Mich. 557; Neilson *v.* Crawford, 52 Cal. 248. See, also, Rood *v.* Whorton, 67 Fed. R. 434.

[3] It has been held that the stockholder may set up any defense that was open to the corporation and put the creditor to strict proof of his claim a second time. Moss *v.* McCullough, and cases following, *supra*; Chase *v.* Curtis, 113 U. S. 452; Chestnut *v.* Pennell, 92 Ill. 55. Cases of this kind may be found depending upon the peculiar language of statutes holding the corporation liable for debts in the first instance, if not promptly paid. Trippe *v.* Huncheon, 82 Ind. 307; Southmayd *v.* Russ, 3 Conn. 52; Bailey *v.* Bancker, 3 Hill (N. Y.) 188.

[4] Newberry *v.* Robinson (C. C. S. D. N. Y.) 41 Fed. R. 458, 7 Ry. & Corp. L. J. 396.

[5] Peck *v.* New York, etc., S. S. Co., 3 Bosw. (N. Y.) 622.

son sued as a subscriber or stockholder is liable as such, and he may offer, with some exceptions, the same defenses that he could offer to a suit by the corporation itself.[1] But it is generally held that any fraud on the part of the corporation[2] or its officers[3] is not available as a defense to the claims of a corporate creditor who gave credit on the faith of the subscription and who was not a party to such fraud and had no knowledge of it. And secret agreements by which the corporation contracted that the defendant should not be liable for the unpaid balance of his subscription can not be pleaded as such defense.[4]

§ 182. **Methods of enforcing stockholder's liability.**—The subscriber is liable to garnishment, in common with any other corporate debtor, for unpaid calls that have been made by the company.[5] And it has been held that he may be sued at law

[1] 1 Cook on Stock and Stockholders, § 210. In a suit by the assignee of a judgment against a corporation brought against the stockholders, the assignee must show that he paid a valuable consideration for the judgment assigned. Wilson *v.* St. Louis, etc., R. Co., 120 Mo. 45, 25 S. W. R. 527, 759.

[2] Howard *v.* Glenn., 85 Ga. 238, s. c. 11 S. E. R. 610; Turner *v.* Grangers', etc., Ins. Co., 65 Ga. 649; Tennent *v.* City of Glasgow Bank, L. R. 4 App. Cas. 615; Stone *v.* City, etc., Bank, L. R. 3 C. P. Div. 282; Oakes *v.* Turquand, L. R. 2 H. L. 325; Ruggles *v.* Brock, 6 Hun (N. Y.) 164; Saffold *v.* Barnes, 39 Miss. 399; Chubb *v.* Upton, 95 U. S. 665, 667. But see Savage *v.* Bartlett, (Md.), 28 Atl. R. 414.

[3] *In re* Republic Ins. Co., 3 Biss. (U. S.) 452.

[4] Such an agreement is held to be fraud at law upon the corporate creditors. Scovill *v.* Thayer, 105 U. S. 143; Sagory *v.* Dubois, 3 Sandf. Ch. R. (N. Y.) 466, 499; Upton *v.* Tribilcock, 91 U. S. 45; Chubb *v.* Upton, 95 U. S. 665; Flinn *v.* Bagley, 7 Fed. R. 785; Hickling *v.* Wilson, 104 Ill. 54; Northrop *v.* Bushnell, 38 Conn. 498; Eyerman *v.* Krieckhaus, 7 Mo. App. 455. An agreement operating among and against stockholders only for an apportionment of their several stock liabilities is good and is contrary neither to law or public policy. Winston *v.* Dorsett Pipe & P. Co., 27 Ill. App. 546.

[5] Simpson *v.* Reynolds, 71 Mo. 594; Curry *v.* Woodward, 53 Ala. 371; Hays *v.* Lycoming, etc., Co., 99 Pa. St. 621; Rand *v.* White Mts. R. Co., 40 N. H. 79; Brown *v.* Union Ins. Co., 3 La. Ann. 177; Faull *v.* Alaska, etc., Min. Co., 8 Sawyer (U. S.) 420; note to Thompson *v.* Reno Sav. Bank, 3 Am. St. R. 797, 806. But unpaid subscriptions for which no calls have been issued can not be reached in this way. Bingham *v.* Rushing, 5 Ala. 403; Bunn's Appeal, 105 Pa. St. 49; Brown *v.* Union Ins. Co., 3 La. Ann. 177; McKelvey *v.* Crockett, 18 Nev. 238;

by a corporate creditor for unpaid calls, and that he is liable to a judgment for the full amount due on such calls.[1] But the remedy most commonly resorted to and the one most favored by the courts, is by bill in equity.[2] And it has been said that no one creditor can assume that he alone is entitled to what any stockholder owes, and sue at law so as to appropriate it exclusively to himself.[3] Such a bill should be filed by so many creditors as may wish to bring suit,[4] in favor of any or

Meints *v.* East St. Louis, etc., Co., 89 Ill. 48; Hughes *v.* Oregonian R. Co., 11 Oreg. 158.

[1] Allen *v.* Montgomery R. Co., 11 Ala. 437; Freeman *v.* Winchester, 18 Miss. 577; Bank, etc., *v.* Dallam, 4 Dana (Ky.) 574; McCarthy *v.* Lavasche, 89 Ill. 270; Faull *v.* Alaska, etc., Min. Co., 8 Sawyer (U. S.) 420.

[2] Christensen *v.* Eno, 106 N. Y. 97, 100; Shickle *v.* Watts, 94 Mo. 410, s. c. 7 S.W. 274; Ward *v.* Griswoldville, etc., Co., 16 Conn. 593; Dalton, etc., R. Co. *v.* McDaniel, 56 Ga. 191; Germantown, etc., R. Co. *v.* Fitler, 60 Pa. St. 124; Allen *v.* Montgomery, etc., R. Co., 11 Ala. 437; Henry *v.* Vermillion, etc., Turnp. Co., 17 Ohio 187; Crawford *v.* Rohrer, 59 Md. 599; Adler *v.* Milwaukee, etc., Co., 13 Wis. 57; Hickling *v.* Wilson, 104 Ill. 54; Harmon *v.* Page, 62 Cal. 448; Ogilvie *v.* Knox Ins. Co., 22 How. (U. S.) 380; Hatch *v.* Dana, 101 U. S. 205; Holmes *v.* Sherwood, 16 Fed. R. 725; Louisiana Paper Co. *v.* Waples, 3 Woods (U. S.) 34; Faull *v.* Alaska, etc., Min. Co., 8 Sawyer (U. S.) 420. A creditors' bill is a proper remedy for enforcing personal liability of stockholders. Stutz *v.* Handley (C. C. M. D. Tenn.) 7 Ry. & Corp. L. J. 407, 41 Fed. R. 531. Such a bill can not be maintained to enforce a stale claim. Wilson *v.* St. Louis, etc., R. Co., 120 Mo. 45, 894, 25 S. W. 527, 759.

[3] Patterson *v.* Lynde, 106 U. S. 519. It seems to be a settled rule in the United States Courts that unpaid subscriptions can be reached by a corporate creditor in a court of equity only. Brown *v.* Fisk, 23 Fed. R. 228. Some states provide by statute that the only remedy to enforce the payment of a debt of a corporation against the individual stockholders thereof shall be by bill in chancery. Stimson's Am. Stat. (1892), § 8143, citing the laws of New Hampshire, Pennsylvania and Maryland. Many of the courts hold a bill in equity to be the creditor's only means of reaching unpaid subscriptions. Jones *v.* Jarman, 34 Ark. 323; Erickson *v.* Nesmith, 15 Gray (Mass.) 221; Smith *v.* Huckabee, 53 Ala. 191; Umsted *v.* Buskirk, 17 Ohio St. 113; Hodges *v.* Silver Hill Min. Co., 9 Ore. 200. Even where the general equitable remedy by creditor's bill has been abolished by statute, the right to proceed herein by suit in equity has been held to exist. Adler *v.* Milwaukee, etc., Co., 13 Wis. 57. An action at law can not be maintained by a creditor of a corporation, under Wash. Code, § 2434, against a stock subscriber, for the unpaid portion of his subscription. Burch *v.* Taylor, 1 Wash. 245, 24 Pac. 438.

[4] Crease *v.* Babcock, 10 Metc. (Mass.) 525; Patterson *v.* Lynde, 106 U. S. 519. Several creditors can not bring separate suits but the first properly framed bill takes precedence, and another

all creditors that may choose to come in and establish their claims,[1] and should be directed against the corporation itself,[2] and all solvent subscribers within the jurisdiction of the court whose subscriptions are not fully paid, excepting such as are unknown.[3]

§ 183. **Contribution.**—The creditors are under no obligation to see that the payments made by the subscribers are proportionally equal, but a court of chancery will compel payment of so much of the unpaid subscriptions of the stockholders that are before it as may be necessary to pay the corporate debts.[4]

creditor's suit may be enjoined. Pierce *v.* Milwaukee Construction Co., 38 Wis. 253.

[1] Morgan *v.* New York, etc., R. Co., 10 Paige (N. Y.) 290; Umsted *v.* Buskirk, 17 Ohio St. 113; Crease *v.* Babcock, 10 Metc.(Mass.) 525; Wetherbee *v.* Baker, 35 N. J. Eq. 501; Coleman *v.* White, 14 Wis. 700; Terry *v.* Little, 101 U. S. 216. Even if the bill was not filed for the benefit of all creditors choosing to come in and share the expense, any creditor has a right to establish his claim under it and share *pro rata* in the distribution of the assets. Turnbull *v.* Prentiss Lumber Co., 55 Mich. 387; Walker *v.* Crain, 17 Barb. (N. Y.) 119. See, also, Wright *v.* McCormack, 17 Ohio St. 86; Adler *v.* Milwaukee, etc., Co., 13 Wis. 57.

[2] Walser *v.* Memphis, etc., R. Co., 19 Fed. R. 152; Mann *v.* Pentz, 3 N. Y. 415; Wetherbee *v.* Baker, 35 N. J. Eq. 501. Where the corporation is beyond the jurisdiction or is defunct it need not be made a party. Walser *v.* Seligman, 21 Blatch. (U. S.) 130; Wellman *v.* Howland, etc., Works, 19 Fed. R. 51.

[3] Walser *v.* Memphis, etc., R. Co., 19 Fed. R. 152; Vick *v.* Lane, 56 Miss. 681; Erickson *v.* Nesmith, 46 N. H. 371; Umsted *v.* Buskirk, 17 Ohio St. 113; Pierce *v.* Milwaukee, etc., Co., 38 Wis. 253. All need not be originally made parties, according to the authority of some cases, but the stockholders against whom the suit is directed may bring in those not made parties by cross-bill and thus enforce contribution. Hatch *v.* Dana, 101 U. S. 205. See, also, Ogilvie *v.* Knox Ins. Co., 22 How. 380; Glenn *v.* Williams, 60 Md. 93; Griffith *v.* Mangam, 73 N. Y. 611; Brundage *v.* Monumental, etc., Co., 12 Ore. 322; Lamar Ins. Co. *v.* Gulick, 102 Ill. 41; Von Schmidt *v.* Huntington, 1 Cal. 55. Some cases hold that judgment can not be rendered against part of the delinquent subscribers unless it affirmatively appear that the others are insolvent or beyond the jurisdiction of the court. Wood *v.* Dummer, 3 Mason (U. S.) 308; Bonewitz *v.* Van Wert Co. Bank, 41 Ohio St. 78; Marsh *v.* Burroughs, 1 Woods 463. See Erickson *v.* Nesmith, 46 N. H. 371; Beach on Priv. Corp., § 700. But this rule may well be doubted. See Hatch *v.* Dana, 101 U. S. 205. Cook on Stock and Stockholders (2d ed., § 206.

[4] Pentz *v.* Hawley, 1 Barb. Chan. (N. Y.) 122; Marsh *v.* Burroughs, 1 Woods (U. S.) 463; Evans *v.* Coventry, 25 L. J. Chan. 489. But actual subscribers are not liable for that part of the capital stock which was never subscribed. Evans *v.* Coventry, *supra.*

The stockholder may, however, in general, have the other stockholders within the jurisdiction joined as defendants,[1] in which case contribution may be enforced in the original suit.[2] Or, if he is compelled to pay more than his proportion of the debts of the company, he may maintain a suit against his co-stockholders for contribution.[3] The fact that the creditor is himself a stockholder and delinquent in making payments on his stock does not prevent him from recovering against other delinquent subscribers in a suit to enforce payment of a judgment obtained by him against the corporation. But he must contribute ratably with the other stockholders to the payment of the amount due him.[4] It is held that a part of the stockholders may, in a proper case, file a bill in equity upon their own account, making the corporation a party, to enforce the payment of unpaid balances of subscriptions, for the payment of corporate indebtedness, and for contribution, even before a creditor's bill has been filed.[5]

[1] Hatch *v.* Dana, 101 U. S. 205. The fact that creditors of a corporation have released one stockholder from his liability is of no concern to another stockholder unless his liability has been thereby increased, and he is still liable on his subscription to the capital stock. Howard *v.* Glenn, 85 Ga. 238, 11 S. E. 610. A creditor of a corporation may bring individual action at law against one of the stockholders to recover to the amount of his entire *pro rata* liability, notwithstanding that he has compromised with other stockholders, especially where the offer to compromise was made to all with notice that if not accepted the creditor would claim his full legal rights. Hall *v.* Klinck, 25 S. C. 348, 60 Am. R. 505. A compromise decree making an offer of terms of settlement to all alike who are liable on stock of an insolvent corporation does not release those who do not accept it from their liability on the stock. Hambleton *v.* Glenn, 72 Md. 351, 20 Atl. 115.

[2] Holmes *v.* Sherwood, 3 McCrary 405; Umsted *v.* Buskirk, 17 Ohio St. 113; Hodges *v.* Silver Hill Min. Co., 9 Ore. 200; Masters *v.* Rossie, etc., Co., 2 Sandf. Ch. 301; N. Y. Code of Civil Procedure, §§ 1791–1794.

[3] Millaudon *v.* New Orleans, etc., R. Co., 3 Rob. (La.) 488; Matthews *v.* Albert, 24 Md. 527; Wincock *v.* Turpin, 96 Ill. 135; Stewart *v.* Lay, 45 Iowa 604; Hadley *v.* Russell, 40 N. H. 109; Stover *v.* Flack, 30 N. Y. 64; Umsted *v.* Buskirk, 17 Ohio St. 113; Farrow *v.* Bivings, 13 Rich. Eq. (S. C.) 25; Gray *v.* Coffin, 9 Cush. (Mass.) 192; Marsh *v.* Burroughs, 1 Woods (U. S.) 463; Holmes *v.* Sherwood, 3 McCrary 405; Sutton's Case, 3 DeG. & Sm. 262; Brinham *v.* Wellersburg Coal Co., 47 Pa. St. 43, where it is said that the right to contribution in Pennsylvania is purely statutory.

[4] Wilson *v.* Kiesel, 9 Utah 397, 35 Pac. R. 488. See, also, Thompson *v.* Reno Sav. Bank, 19 Nev. 103, s. c. 3 Am. St. R. 797.

[5] Fiery *v.* Emmert, 36 Md. 464.

§ 184. **Suits by assignees and receivers.**—In case the corporation has passed into the hands of a receiver or an assignee it is the duty of such receiver[1] or assignee[2] to collect the unpaid subscriptions necessary for the payment of the debts of the corporation, and the creditors' right to proceed directly against the delinquent shareholders is usually suspended during the time it remains in his hands.[3] A receiver represents the creditors as well as the shareholders and corporation, and may, as such representative and as an officer of the court, disaffirm illegal and fraudulent transfers of corporate property and recover its misapplied funds and securities,[4] although he can not, ordinarily, enforce a subscription which the corporation could not have enforced at the time of his appointment.[5]

§ 185. **Statutory liability of stockholders.**—In several of the states a corporation creditor may, upon the dissolution of a railroad corporation without payment of his debt, sue the stockholders individually and recover the whole debt, leaving the stockholder paying it to his action against the other stockholders for contribution.[6] Other states provide by statute that

[1] Andrews *v.* Bacon, 38 Fed. R. 777; Dayton *v.* Borst, 31 N. Y. 435; Frank *v.* Morrison, 58 Md. 423; Mean's Appeal, 85 Pa. St. 75; Chandler *v.* Brown, 77 Ill. 333; note to Germantown, etc., Ry. Co. *v.* Fitler, 100 Am. Dec. 551. Under the English Railway Companies Act of 1867, a receiver has no such power. *In re* Birmingham, etc., R. Co., L. R. 18 Ch. Div. 155.

[2] Tobey *v.* Russell, 9 R. I. 58; Clarke *v.* Thomas, 34 Ohio St. 46; Stewart *v.* Lay, 45 Iowa 604; Phœnix, etc., Co. *v.* Badger, 67 N. Y. 294; Shockley *v.* Fisher, 75 Mo. 498; Vanderwerken *v.* Glenn, 85 Va. 9, s. c. 6 S. E. R. 806; Chamberlain *v.* Bromberg, 83 Ala. 476, s. c. 3 So. R. 434; note to Germantown, etc., Ry. *v.* Fitler, 100 Am. Dec. 551, 556. An assignee in bankruptcy may sue by bill in equity to recover unpaid subscriptions. Sawyer *v.* Hoag, 17 Wall. (U. S.) 610, 621; Chubb *v.* Upton, 95 U. S. 665; Payson *v.* Stoever, 2 Dill (U. S.) 427.

[3] See Franklin *v.* Menown, 10 Mo. App. 570. But the creditors may compel the receiver to act for them in collecting unpaid subscriptions. Stark *v.* Burke, 9 La. Ann. 341; Rankine *v.* Elliott, 16 N. Y. 377; Atwood *v.* R. I. Agric. Bank, 1 R. I. 376.

[4] Attorney-General *v.* Guardian, etc., Co., 77 N. Y. 272; Davis *v.* Gray, 16 Wall. (U. S.) 203, 218; Graham Button Co. *v.* Spielmann, 50 N. J. Eq. 120, 24 Atl. R. 571; Voorhees *v.* Indianapolis, etc., Co., 140 Ind. 220, 39 N. E. R. 738; 1 Elliott's Gen. Pr., § 393; 2 Beach Eq., § 905; High on Receivers, §§ 314, 315, 317.

[5] Cutting *v.* Damerel, 88 N. Y. 410; Taylor Priv. Corp., § 542.

[6] Stimson's Am. Stat. (1892), § 8354.

each stockholder shall be liable for the debts of the corporation to the amount unpaid of the stock held or subscribed for by him until all the stock is paid in,[1] while some of the states add a personal liability on the part of the stockholders for the wages of certain of their employes, regardless of the fact that their stock may or may not be paid in full.[2] And similar provisions are frequently found in special charters.[3] The individual liability of members for the debt of a corporation is a departure from the established rules of law, and is founded solely upon grounds of public policy, depending entirely upon express provisions of the statute law; and such liability is to be construed reasonably but strictly, rather than liberally, and not extended beyond the limits to which it is plainly carried by such provisions of the statute.[4] Accordingly it is held that

This provision is very commonly found as to other corporations, but not often as to railroads. 1 Cook on Stock and Stockholders, § 212. Under the Kansas law governing private corporations stockholders are severally and not jointly liable to the corporation creditors, and each must be sued separately. Abbey *v.* W. B. Grimes Dry Goods Co., 44 Kan. 415, 8 Ry. & Corp. L. J. 207, 24 Pac. 426. Where the directors of a corporation, acting in good faith, have borrowed money for the purposes of the corporation, the indebtedness against the corporation is created, the stockholders become personally liable to the lender of the money or the sureties who pay it, and it is not necessary to show that all the money was actually appropriated to the legitimate uses of the corporation. Borland *v.* Haven (C. C. N. D. Cal.), 37 Fed R. 394.

[1] Stimson's Am. Stat. (1892), §§ 8140, 8630. South Carolina creates a liability to the value of the shares when the debt was created and five per cent. of the par value thereof additional. Laws S. C. 1885, Ch. 96, § 7. In Ohio the stockholder is made liable to the amount of stock owned by him, in addition to the amount unpaid thereon. R. S. Ohio, 1890, § 3259. The liability created by a statute similar to the present one in South Carolina, was held to be enforceable by an action at law against one stockholder individually. Hall *v.* Klinck, 25 S. C. 348, 60 Am. R. 505.

[2] Stimson's Am. Stat. (1892), §§ 8142, 8553. Holders of preferred stock in an insolvent corporation are subject to the statutory liability for its debts, equally with the common stockholders. Railroad Co. *v.* Smith, 48 Ohio St. 219.

[3] A provision in an act of incorporation, that stockholders shall be individually liable "to the extent of double the amount of the stock subscribed for or held by them," renders them liable to double the amount of their stock, whether paid up or not. Dreisbach *v.* Price, 133 Pa. 560, 26 W. N. C. 61, 19 Atl. 569.

[4] Libby *v.* Toby, 82 Me. 397, where the plaintiff sought to enforce against a stockholder, a judgment re-

such liability for debts can not be enforced to pay damages recovered against the corporation in an action in tort.[1]

§ 186. **Defenses to actions to enforce statutory liability.** — In suits to enforce such liability, certain defenses are open to the stockholder that would not be allowed him in an equitable suit to enforce payment of his subscription to the corporation. Thus he may show that the debt for which the suit is brought does not belong to the particular class for which the stockholders are made liable,[2] and it is held, in general, that statutes fixing a personal liability upon the stockholders for debts due to servants or laborers are enacted for the benefit of that "class whose members usually look to the reward of a day's labor or service for immediate or present support, from whom the company does not expect credit, and to whom its future ability to pay is of no consequence."[3] Consequently,

covered against the corporation under the Maine statute. O'Reilly *v.* Bard, 105 Pa. St. 569; Chase *v.* Lord, 77 N. Y. 1; Chamberlin *v.* Huguenot, etc., Co., 118 Mass. 532; Windham, etc., Inst. *v.* Sprague, 43 Vt. 502; Salt Lake City Nat. Bank *v.* Hendrickson, 40 N. J. Law 52; note to Thompson *v.* Reno Sav. Bank, 3 Am. St. R., 797, 834, 24 Am. & Eng. Cyc. of Law, 869. "The individual liability of stockholders in a corporation for the payment of its debts is always a creation of statute. At common law it does not exist. The statute which creates it may also declare the purpose of its creation and provide for the manner of its enforcement." Pollard *v.* Bailey, 20 Wallace 520; Terry *v.* Little, 101 U. S. 216; Russell *v.* Pac. R. Co., (Cal.) 45 Pac. R. 323.

[1] Heacock *v.* Sherman, 14 Wend. (N. Y.) 58; Stanton *v.* Wilkeson, 8 Ben. (U. S.) 357; Chase *v.* Curtis, 113 U. S. 452; Cable *v.* McCune, 26 Mo. 371; Bohn *v.* Brown, 33 Mich. 257, 263; Zimmer *v.* Schleehauf, 115 Mass. 52. Note to Prince *v.* Lynch, 99 Am. Dec. 427, 435. A stockholder of a railroad company is not personally liable for the negligence of the officers, agents, or employes of the company in the operation of its road. Atchison, T. & S. F. R. Co. *v.* Cochran, 43 Kan. 225, 41 Am. & Eng. R. Cas. 48, 7 L. R. A. 414.

[2] Wilson *v.* The Stockholders, 43 Pa. St. 424; Conant *v.* VanSchaick, 24 Barb. (N. Y.) 87; Larrabee *v.* Baldwin, 35 Cal. 155. One who became a stockholder after the debt was incurred by the corporation is liable under the statute like any other stockholder. Railroad Co. *v.* Smith, 48 Ohio St. 219.

[3] Wakefield *v.* Fargo, 90 N. Y. 213, 217, overruling several earlier cases; Adams *v.* Goodrich, 55 Ga. 233. And see Harrod *v.* Hamer, 32 Wis. 162; note to Thompson *v.* Reno Sav. Bank, 3 Am. St. R. 797, 842.

a civil engineer,[1] or his assistant,[2] or a superintendent,[3] or a general manager,[4] will not be entitled to enforce such liability for his own benefit, where it is confined to debts due "laborers and servants." But a master mechanic and superintendent of works has been held to be a "servant and laborer" under a similar statute applying to manufacturing companies.[5] And a superintendent of construction, who acted as foreman of a gang of one hundred and fifty men engaged in digging trenches and laying gas-pipes, and whose duties required him to be with the men while at work and occasionally to do some physical labor because of a scarcity of hands, was held a "laborer" within the meaning of a mechanic's lien law.[6] The stockholder may also show in defense to such a suit that the corporate creditor by express contract made at the time the debt was incurred waived his right to resort to the stockholders for payment in whole or in part, and it is settled in England that he may show that the contract contained a stipulation by the corporation for the exemption of its members from the liability imposed upon them by statute in the event of corporate insolvency.[7] So he may show that he has been separately released from the statutory liability,[8] or that he has voluntarily paid

[1] Pennsylvania, etc., R. Co. *v.* Luefer, 84 Pa. St. 168; Ericsson *v.* Brown, 38 Barb. (N. Y.) 390. *Contra*, Conant *v.* VanSchaick, 24 Barb. (N. Y.) 87; Williamson *v.* Wadsworth, 49 Barb. 294.

[2] Brockway *v.* Innes, 39 Mich. 47, s. c. 33 Am. R. 348.

[3] Kincaid *v.* Dwinelle, 59 N. Y. 548. And see Gurney *v.* Atlantic, etc., R. Co., 58 N.Y. 358; Gordon *v.* Jennings, L. R. 9 Q. B. Div. 45. But compare Sleeper *v.* Goodwin, 67 Wis. 577.

[4] Wakefield *v.* Fargo, 90 N. Y. 213; Hill *v.* Spencer, 61 N. Y. 274.

[5] Sleeper *v.* Goodwin, 67 Wis. 577, s. c. 31 N. W. 335.

[6] Pendergast *v.* Yandes, 124 Ind. 159.

[7] Such a contract is valid. Robinson *v.* Bidwell, 22 Cal. 379; Basshor *v.* Forbes, 36 Md. 154; Brown *v.* Eastern Slate Co., 134 Mass. 590, where the waiver was oral; Hess *v.* Werts, 4 Serg. & R. (Pa.) 356; *In re* State Fire Ins. Co., 1 Hem. & M. 457, 1 DeG., F. & J. 634. But the exemption must be clearly proved. Skinner *v.* Dayton, 19 John. (N. Y.) 513, 537; *Re* Athenaeum, etc., Society, 3 DeG. & J. 660. A stipulation against holding stockholders liable has been held to refer to the statutory liability and not to the subscription liability. Preston *v.* Cincinnati, etc., R. Co., 36 Fed. R. 54.

[8] Where the stockholders are held to be severally and not jointly liable under the statute, one may be released without releasing the others. Bank, etc., *v.* Ibbotson, 5 Hill (N. Y.) 461. See, also, Herries *v.* Platt, 21 Hun

corporate debts to the full amount of such liability.[1] He may also, in some jurisdictions, set off a debt or judgment due him from the corporation against a personal action brought by an individual creditor, where the statute provides for such suits,[2] although, as we have seen, a different rule applies in case of an ordinary suit to reach unpaid subscriptions for the creditors. Of course he may set up in defense any proper matters tending to show that he is not a stockholder and that a stockholder's liabilities do not attach to him.[3] But it is no defense that the creditor purchased his claim against the corporation at a discount after its insolvency.[4]

§ 187. Who may institute action to enforce statutory liability.—An action to enforce the statutory liability can only be

(N. Y.) 132; Prince *v.* Lynch, 38 Cal. 528; Borland *v.* Haven, 37 Fed. R. 394.

[1] Mathez *v.* Neidig, 72 N. Y. 100; Boyd *v.* Hall, 56 Ga. 563; San Jose Sav. Bank *v.* Pharis, 58 Cal. 380. The payments must be *bona fide*. Thebus *v.* Smiley, 110 Ill. 316; Manville *v.* Karst, 16 Fed. R. 173. And must be made before the suit in which they are relied upon as a defense was commenced. Jones *v.* Wiltberger, 42 Ga. 575. But see Richards *v.* Brice, 3 N. Y. Supp. 941. And his exemption from liability will be measured by the sum actually paid on corporate debts and judgments, and not by the face of the claims paid off or purchased by him. Kunkelman *v.* Rentchler, 15 Brad. (Ill.) 271; Bulkley *v.* Whitcomb, 49 Hun (N. Y.) 290; Holland *v.* Heyman, 60 Ga. 174. The fact that suits brought by other stockholders are pending is no defense, so long as they have not been brought to judgment. Ingalls *v.* Cole, 47 Me. 530, 541; Grose *v.* Hilt, 36 Me. 22, denies the doctrine of the text.

[2] Wheeler *v.* Millar, 90 N. Y. 353, 362; Christensen *v.* Colby, 43 Hun (N. Y.) 362; Boyd *v.* Hall, 56 Ga. 563; Jerman's Adm'r *v.* Benton, 79 Mo. 148. The rule is different when the suit is on behalf of the corporation to reach unpaid subscriptions. Thompson *v.* Reno Sav. Bank, 19 Nev. 103, s. c. 3 Am. St. R. 797, and note 826. Judgments purchased by him can only be set off to the extent of the amount that was actually paid for them. Bulkley *v.* Whitcomb, 49 Hun (N. Y.) 290. In action by corporation creditors to enforce the statutory liability of a stockholder, the stockholder must have held his claim against the corporation at the time the execution against the corporation was returned *nulla bona*, in order to use it as a defense. Coquard *v.* Prendergast, 35 Mo. App. 237.

[3] 1 Cook on Stock and Stockholders, (2d ed.), § 225.

[4] Coquard *v.* Prendergast, 35 Mo. App. 237. An assignee of a judgment against a corporation, in order to maintain an action upon it against the individual stockholders, must show that he paid a valuable consideration for it. Wilson *v.* St. Louis, etc., R. Co., 120 Mo. 45, 25 S. W. R. 527, 759.

maintained by the creditors themselves for their own benefit.[1] Neither the corporation itself,[2] nor its assignee,[3] nor a receiver can enforce it.[4] Herein lies another distinction between the statutory liability of a stockholder and his ordinary liability for unpaid subscriptions.

§ 188. **How statutory liability is enforced—Judgment and execution against the corporation.**—In most of the states, special provision is made for enforcing this liability,[5] but it is the rule in many jurisdictions that, even where not expressly required by statute, an action for this cause must be preceded by a judgment and an execution returned unsatisfied.[6] In other jurisdictions, however, it is held that the statutory liabilitity of stockholders is primary and may be enforced, without first obtaining a judgment against the corporation.[7] Such a judgment

[1] Farnsworth *v.* Wood, 91 N. Y. 308; note to Thompson *v.* Reno Sav. Bank, 3 Am. St. R. 797, 847; Hicks *v.* Burns, 38 N. H. 141.

[2] Umsted *v.* Buskirk, 17 Ohio St. 113; Liberty, etc., Ass'n *v.* Watkins, 70 Mo. 13.

[3] Wright *v.* McCormack, 17 Ohio St. 86, 95; Dutcher *v.* Marine Nat. B'k, 12 Blatch. (U. S.) 435.

[4] Billings *v.* Robinson, 94 N. Y. 415; Arenz *v.* Weir, 89 Ill. 25; Jacobson *v.* Allen, 20 Blatch. (U. S.) 525, 12 Fed. R. 454. Unless, of course, the receiver is vested with that right by statute. Walker *v.* Crain, 17 Barb. (N.Y.) 119; Richmond *v.* Irons, 121 U. S. 27.

[5] Stimson's Am. Stat. (1892), § 8143; note to Thompson *v.* Reno Sav. Bank, 3 Am. St. Rep. 797, 854. If no remedy is provided and the statute simply affirms the liability of stockholders for unpaid subscriptions, the usual remedy in equity is the proper one. But if a new liability is imposed upon the stockholders severally, the creditor's remedy may be either at law or in equity, according to the circumstances of the case, and the nature of the relief that should be granted. For authorities upon these propositions, and upon the subject of parties in such cases, see the exhaustive note to Thompson *v.* Reno Sav. Bank, 3 Am. St. Rep. 797, 855, 858.

[6] Means's Appeal, 85 Pa. St. 75; Bayliss *v.* Swift, 40 Iowa 648; Lane *v.* Harris, 16 Ga. 217; Drinkwater *v.* Portland, etc., R. Co., 18 Me. 35; Wright *v.* McCormack, 17 Ohio St. 86; note to Prince *v.* Lynch, 99 Am. Dec. 427, 434; 2 Morawetz Corp., § 883; Cook on Stock and Stockholders, § 221. See, also, Globe Pub. Co. *v.* State Bank, (Neb.) 10 Lewis Am. R. R. & Corp. Rep. 589.

[7] Spence *v.* Shapard, 57 Ala. 598; Davidson *v.* Rankin, 34 Cal. 503; Queenan *v.* Palmer, 117 Ill. 619, 629; Todhunter *v.* Randall, 29 Ind. 275; McMahon *v.* Macy, 51 N. Y. 155, 160; Sleeper *v.* Goodwin, 67 Wis. 577, 586. Compare Marshall *v.* Harris, 55 Iowa 182, with the Iowa case cited in last note, and Harper *v.* Union, etc., Co., 100 Ill. 225, with Illinois case herein cited. See, also, as to when prior proceedings against the corporation

is generally held conclusive as to the amount and validity of the creditor's claim in the same manner as when the suit is to enforce payment of balances due on subscriptions.[1]

§ 189. **Priority among creditors—Forum—Contribution.**—A judgment creditor of an insolvent corporation who first moves to charge a stockholder on his liability under the statute, acquires the priority of right to recover against such stockholder, with which a creditor subsequently moving can not rightfully interfere.[2] The courts of another state in which a part of the stockholders may reside, will generally enforce a liability imposed by statute or charter, for contract debts of the company,[3] though they will not enforce penalties prescribed for failures to obey state regulations.[4] This liability may be enforced against the estate of a deceased shareholder.[5] Stockholders are usually entitled, in equity, to contribution from other shareholders, as in the case of suits for unpaid subscriptions.[6]

§ 190. **When stockholders are liable as partners.**—Stockholders may generally be held liable as partners for the pay-

are excused as useless. Paine *v.* Stewart, 33 Conn. 516; Hodges *v.* Silver, etc., Co., 9 Ore. 200; Fourth Nat. Bank *v.* Francklyn, 120 U. S. 747; Shellington *v.* Howland, 53 N. Y. 371; State Sav. Assn. *v.* Kellogg, 52 Mo. 583.

[1] See note to Thompson *v.* Reno Sav. Bank, 3 Am. St. Rep. 797, 858. In Ohio, suits against the stockholder directly are permitted, and it is held that he can interpose only such defenses to them as are available to the corporation. Railroad Co. *v.* Smith, 48 Ohio St. 219.

[2] Wells *v.* Robb, 43 Kan. 201, 23 Pac. 148; Cole *v.* Butler, 43 Me. 401; Lowry *v.* Parsons, 52 Ga. 356; Thebus *v.* Smiley, 110 Ill. 316. But see City of Chicago *v.* Hall, 103 Ill. 342; State Sav. Assn. *v.* Kellogg, 63 Mo. 540.

[3] Corning *v.* McCullough, 1 N. Y. 47; Lowry *v.* Inman, 46 N. Y. 119, 127; Woods *v.* Wicks, 7 Lea. (Tenn.) 40; Aultman's Appeal, 98 Pa. St. 505; Queenan *v.* Palmer, 117 Ill. 619; Manville *v.* Edgar, 8 Mo. App. 324; Sackett's Harbor Bank *v.* Blake, 3 Rich. Eq. (S. C.) 225; Flash *v.* Conn., 16 Fla. 428, s. c. 26 Am. Rep. 721, 109 U. S. 371; Howell *v.* Manglesdorf, 33 Kans. 194, 199. Aldrich *v.* Anchor Coal, etc., Co., 24 Oreg. 32, s. c. 41 Am. St. Rep. 831. But see, where special remedy is provided, Fowler *v.* Lamson, 146 Ill. 472, s. c. 37 Am. St. Rep. 163, and note.

[4] Derrickson *v.* Smith, 27 N. J. Law 166; Lowry *v.* Inman, 46 N. Y. 119; Sayles *v.* Brown, (C. C. D. Md.) 40 Fed. Rep. 8.

[5] Richmond *v.* Irons, 121 U. S. 27; Chase *v.* Lord, 77 N. Y. 1; Manville *v.* Edgar, 8 Mo. App. 324.

[6] 1 Cook on Stock and Stockholders, § 227; note to Thompson *v.* Reno Sav. Bank, 3 Am. St. R. 797, 870; Taylor on Priv. Corp., § 783.

ment of debts incurred by the company, if it has proceeded to do business without taking the requisite steps to become legally incorporated.[1] And where the business undertaken is not authorized by the act under which incorporation is attempted, a partnership liability will be incurred by all who become members,[2] as it also is, according to some authorities, where a corporation is formed to do business only outside of the state creating it, the formation of such a corporation being held to be a fraud upon the law.[3] But the great weight of authority is opposed to this latter rule.[4] What omissions in the articles will render the incorporation so incomplete as to fix a partnership liability upon the members may depend largely upon the language of the statute under which incorporation is attempted;

[1] Kaiser *v.* Lawrence Sav. Bank, 56 Iowa 104, s. c. 41 Am. R. 85; Wechselberg *v.* Flour City Nat. Bank, 64 Fed. R. 90; Hurt *v.* Salisbury, 55 Mo. 310; Pettis *v.* Atkins, 60 Ill. 454; Fuller *v.* Rowe, 57 N. Y. 23; Walton *v.* Oliver, 49 Kan. 107; Unity Ins. Co. *v.* Cram, 43 N. H. 636; Smith *v.* Colorado, etc., Co., 14 Fed. R. 399; Harris *v.* McGregor, 29 Cal. 124; Midill *v.* Collier, 16 Ohio St. 599, 613; Coleman *v.* Coleman, 78 Ind. 344; Martin *v.* Fewell, 79 Mo. 401; Western, etc., T. Co. *v.* Union Pacific R. Co., 3 Fed. R. 721; Field *v.* Cooks, 16 La. Ann. 153; Bigelow *v.* Gregory, 73 Ill. 197; Garnett *v.* Richardson, 35 Ark. 144. But, see Humphrey *v.* Mooney, 5 Colo. 282; Planter's, etc., Bank *v.* Padgett, 69 Ga. 159; Merriman *v.* Magiveny, 12 Heisk. (Tenn.) 494; Merchants', etc., Bank *v.* Stone, 38 Mich. 779; Whitney *v.* Hyman, 101 U. S. 392.

[2] 1 Cook on Stock and Stockholders, § 236; Vredenburg *v.* Behan, 33 La. Ann. 627. So where the law under which incorporation is attempted is unconstitutional. Eaton *v.* Walker, 76 Mich. 579. See, also, Chenango Bridge Co. *v.* Paige, 83 N. Y. 178, 190; Williams *v.* Bank, 7 Wend. (N. Y.) 541; Kennedy *v.* McLellan, 76 Mich. 598, 43 N. W. R. 638; Heaston *v.* Cincinnati, etc., R. R. Co., 16 Ind. 275, 278.

[3] Land Grant R., etc., Co. *v.* Coffey Co., 6 Kan. 245, and Opinion of Atty. Gen. of Texas (1887), 2 Ry. & Corp. L. J. 433, where the companies were only authorized to transact business outside the sovereignty creating them. Hill *v.* Beach, 12 N. J. Eq. 31; Kruse *v.* Dusenbury, 19 Weekly Dig. (N. Y. C. P.) 201; Montgomery *v.* Forbes, 148 Mass. 249, where regularly organized corporations had places of business only outside of the states by which they were created.

[4] Canada Southern R. Co. *v.* Gebhard, 109 U. S. 527; Oregonian R. Co. *v.* Oregon R., etc., Co., 23 Fed. R. 232; *In re* New York, etc., R. Co., 35 Hun (N. Y.) 220; Demarest *v.* Flack, 128 N. Y. 205; Pennsylvania Co. *v.* Sloan, 1 Bradw. (Ill.) 364; Second Nat. Bank *v.* Hall, 35 Ohio St. 158, where the stockholders escaped a personal liability by organizing under the laws of an adjoining state. Bateman *v.* Service, L. R. 6 App. Cases 386.

for a failure to observe immaterial provisions,[1] or to perform acts required after the incorporation is effected will not, as a rule, vitiate the organization,[2] and different preliminary acts are made essential in different statutes.[3] Nor is it true in every case that the failure to fully comply with the statute will make the stockholders liable as partners. The doctrine of estoppel should not be overlooked. In accordance with that doctrine it is fairly well settled that where there is a valid law providing for incorporation and an attempt has been made in good faith to incorporate under such law for the purposes therein specified, and to carry on the authorized business as a corporation, one who deals with it as such is estopped from questioning the corporate existence and can not hold the incorporators liable as partners, notwithstanding the fact that the statutory formalities may not have been fully complied with.[4] A stockholder, if held to the liability of a partner, will,

[1] McClinch *v.* Sturgis, 72 Me. 288, where notice of the meeting to organize was not sent to all the members. Judah *v.* American, etc., Co., 4 Ind. 333, where the subscriptions were taken and notice of the stockholders' meeting given in a different manner from that provided in the act. Stout *v.* Zulick, 46 N. J. L. 599, 7 Atl. 362, where an immaterial part of the certificate of acknowledgment was omitted. Russel *v.* McLellan, 14 Pick. (Mass.) 63; Holmes *v.* Gilliland, 41 Barb. 568, where no notice was given to the community by publication. Granby, etc., Co. *v.* Richards, 95 Mo. 106, 8 S. W. 246, where the articles were not filed with the county clerk. For omissions held material, see note 1, *supra*, p. 271.

[2] Trowbridge *v.* Scudder, 11 Cush. Mass. 83, where the principal business for which the corporation was organized was never begun. Langan *v.* Iowa, etc., Construction Co., 49 Iowa, 317, where the company had been guilty of *ultra vires* and fraudulent acts. First Nat. Bank *v.* Davies, 43 Iowa 424, where the articles were to be filed within ninety days. But in the recent case of Cincinnati Cooperage Co. *v.* Bate, (Ky.) 10 Lewis's Am. R. R. & Corp. R. 653, s. c. 26 S. W. R. 538, it is held that changing the name of a corporation without complying with the statute is to destroy the identity of the corporation and amounts to a virtual abandonment of it, so as to render the stockholder liable as partner. The soundness of this decision, however, seems to us to be doubtful, and such, we understand, is the opinion of Mr. Lewis as indicated in the note in 10 Lewis's Am. R. R. & Corp. R. 665, *et seq.*

[3] Stimson's Am. Stat. Law, §§ 8022–8024, 8522, 8523.

[4] Vanneman *v.* Young, 52 N. J. L. 403, s. c. 20 Atl. R. 53, 3 Lewis's Am. R. R. & Corp. R. 660, and note; Gartside Coal Co. *v.* Maxwell, 22 Fed. R. 197; Allegheny Nat. Bank *v.* Bailey, 147 Pa. St. 111, 23 Atl. R. 439; American Salt Co. *v.* Heidenheimer, 80 Tex.

ordinarily, be bound only as a partner for the debts contracted while he was a member of the company.[1] A stockholder does not become liable as a partner because he falsely represents that the corporation is solvent,[2] and his promise to pay the corporate debts is a promise to answer for the debts of another within the statute of frauds.[3] Where persons purchase a railroad at execution sale, they acquire none of the special privileges of individual stockholders in the old corporation, and, if they continue to operate it without forming a new corporation, they will incur partnership liabilities on account thereof.[4]

344, 15 S. W. R. 1038; Bushnell *v.* Consolidated, etc., Co., 138 Ill. 67, 27 N. E. R. 596; Larned *v.* Beal, 65 N. H. 184, 23 Atl. R. 149; Walton *v.* Riley, 85 Ky. 413; Whitney *v.* Wyman, 101 U. S. 392; Baker *v.* Neff, 73, Ind. 68; Williamson *v.* Kokomo, etc., Co., 89 Ind. 389; Crowder *v.* Town of Sullivan, 128 Ind. 486, 28 N. E. R. 94; Snyder *v.* Studebaker, 19 Ind. 462; Snider's Sons Co. *v.* Troy, 91 Ala. 224; Rutherford *v.* Hill, 22 Ore. 218; Humphreys *v.* Mooney, 5 Colo. 282; Second Nat. Bank *v.* Hall, 35 Ohio St. 158; First Nat. Bank *v.* Almy, 117 Mass. 476; Laflin, etc., Co. *v.* Sinsheimer, 46 Md. 315; Finnegan *v.* Noerenberg, 52 Minn. 239, s. c. 53 N. W. Rep. 1150, s. c. 38 Am. St. R. 552; Globe Pub. Co. *v.* State Bank, 41 Neb. —; Duke *v.* Taylor, (Fla.) 19 So. R. 172.

175, 10 Lewis's Am. R. R. & Corp. R. 589.

[1] Fuller *v.* Rowe, 57 N. Y. 23. But where he becomes a member by transfer of another's interest, he may be held to have assumed his grantor's liability for precedent debts. Taylor *v.* Ifill, 1 N. R. 566, s. c. 8 L. T. R.(N. S.) 148. It has been held, however, that one who becomes a member after the attempted organization, and takes no part in the management of the company is not liable for its debts because of imperfect incorporation. Stafford Nat. Bank *v.* Palmer, 47 Conn. 443.

[2] Searight *v.* Payne, 2 Tenn. Ch. 175. But he may render himself liable in damages for false representations.

[3] Trustees, etc., *v.* Flint, 13 Metc. (Mass.) 539.

[4] Chaffe *v.* Ludeling, 27 La. Ann. 607.

CHAPTER X.

BY-LAWS, RULES AND REGULATIONS.

§ 191. Power to make by-laws.
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§ 191. **Power to make by-laws.**—The law implies from the act of creating a corporation a grant of power to make all necessary by-laws, or private statutes for the government of itself and its members, officers and agents.[1] This power is, however, in most cases, specially granted to railroad companies and other corporations either by a provision of the company's charter or by general statute.[2] In many cases the power is granted to make by-laws for certain specified purposes,[3] and where this is so, legislation upon other subjects is usually considered as prohibited by implication.[4] The corporation can not pass

[1] Drake *v.* Hudson River R. R. Co., 7 Barb. (N. Y.) 508; State *v.* Overton, 24 N. J. L. 435; Martin *v.* Nashville, etc., Assn. 2 Cold. (Tenn.) 418.

[2] They may make all by-laws and regulations for their own government necessary and consistent with the constitution and laws of the state and with their own charters. Stimson's Am. Stat. (1892), §§ 8070, 8537; Angell & Ames on Corp. (8th ed.), § 325.

[3] Stimson's Am. Stat. (1892), § 8071.

[4] Child *v.* Hudson's Bay Co., 2 Peere Wms. 207; State *v.* Ferguson, 33 N. H. 424, 430; Redfield on Railways (5th ed.), 96; Angell & Ames on Corp.

any by-law inconsistent with its charter,[1] nor, as a rule, any relating to matters outside the objects for which it was incorporated, unless power to do so is expressly conferred.[2] The usual subjects with reference to which corporations ordinarily have power to make by-laws are such as relate to the time and manner of calling and conducting meetings of the stockholders, or of the directors, the number of each required to form a quorum, the method of voting proxies, the number of shares entitling a member to one or more votes, the mode of enforcing forfeitures of stock (where no mode is prescribed by statute), the number of directors and other officers, and the mode of choosing and compensating them, the transfer of stock, and the management and disposition of the corporate property.[3]

§ 192. **Who are affected by corporate by-laws.**—Such by-laws, are obligatory only upon the corporate body, its members and agents, and do not, as a rule, affect the general public.[4] Herein, as we shall hereafter show, they differ from rules and regulations such as those promulgated by common carriers

(8th ed.), § 325. See, also, Taylor *v.* Griswold, 14 N. J. L. 222; McCullough *v.* Annapolis R. Co., 4 Gill (Md.) 58; Rex *v.* Spencer, 3 Burr. 1827; State *v.* Mayor, etc., 33 N. J. L. 57.

[1] Kennebec, etc., R. Co. *v.* Kendall, 31 Me. 470, where it was undertaken to impose a personal liability for calls not imposed by the charter. Carr *v.* St. Louis, 9 Mo. 191, where the corporation undertook to increase the salaries of the officers beyond what the charter allowed. McCullough *v.* Annapolis R. Co., 4 Gill (Md.) 58, where the right of an officer to vote was restricted to a casting vote in case of a tie. See, also, 1 Thomp. Corp., § 1011; American Legion of Honor *v.* Perry, 140 Mass. 580; Kearney *v.* Andrews, 10 N. J. Eq. 70; Presbyterian, etc., Fund *v.* Allen, 106 Ind. 593.

[2] Angell & Ames on Corp. (8th ed.), § 326.

[3] Stimson's Am. Stat. (1892), § 8071.

[4] Bank of Holly Springs *v.* Pinson, 58 Miss. 421, s. c. 38 Am. R. 330; Wait *v.* Smith, 92 Ill. 385; Walker *v.* Wilmington, etc., R. R. Co., 26 S. Car. 80; Samuel *v.* Holladay, 1 Woolw. (U. S.) 400. They bind only members and officers or agents. Worcester *v.* Essex Bridge Co., 7 Gray (Mass.) 457; Susquehannah Ins. Co. *v.* Perrine, 7 Watts & S. (Pa.) 348; Mechanics' Bank *v.* Smith, 19 Johns. 115; Rathbun *v.* Snow, 123 N. Y. 343, s. c. 10 L. R. A. 355; Palmyra *v.* Morton, 25 Mo. 593; Bank of Wilmington *v.* Wollaston, 3 Harring. (Del.) 90. But see Bocock *v.* Alleghany, etc., Co., 82 Va. 913. See also Moyer *v.* East Shore, etc., Co., 25 L. R. A. 48, and note.

to govern their dealings with the public. They are not evidence for the corporation against strangers who deal with it, unless such by-laws are brought home to their knowledge and assented to by them.[1] But the members of the company are affected by all binding statutes of the corporation from the time of their enactment, without any formal notice of their existence.[2]

§ 193. **Limits of power to make by-laws—Reasonableness a question for the court.**—The power of the corporation to make by-laws is always limited by the requirement that they must not be inconsistent with the constitution and valid statutes of the United States or of the state in which it is established nor with the general policy and fundamental principles of common law as it is therein accepted.[3] Thus, it was held in a recent case that a by-law permitting bondholders to vote for directors was in conflict with the constitution of Illinois and the general policy of the state and therefore void.[4] The rule is often stated to be that by-laws must be reasonable[5] and not opposed to common right.[6] The question as to the reasonableness of a by-law

[1] Smith *v.* North Carolina R. Co., 68 N. C. 107; Moyer *v.* East Shore, etc., Co., 41 S. Car. 300, 25 L. R. A. 48, and note. See, also, 1 Thomp. Corp., § 942.

[2] Woodfin *v.* Asheville, etc., Ins. Co., 6 Jones Law (N. Car.) 558; Buffalo *v.* Webster, 10 Wend. (N. Y.) 99; Susquehannah, etc., Co. *v.* Perrine, 7 Watts & S. (Pa.) 348; Arapahoe, etc., Co. *v.* Stevens, 13 Col. 534; Bauer *v.* Samson Lodge, 102 Ind. 262, s. c. 1 N. E. R. 571; Frank *v.* Morrison, 58 Md. 423; Hunter *v.* Sun Mutual, etc., Co., 26 La. Ann. 13.

[3] Angell & Ames on Corp. (8th Ed.), § 332, *et seq.*; Bullard *v.* Bank, 18 Wall. (U. S.) 589; State *v.* City of Cincinnati, 23 Ohio St. 445; Illinois Cent. R. R. Co. *v.* Bloomington, 76 Ill. 447; Kennebec, etc., R. Co. *v.* Kendall, 31 Me. 470; State *v.* Curtis, 9 Nev. 325; Price *v.* Supreme Lodge, 68 Tex. 361, 4 S. W. R. 633; Sayre *v.* Louisville, etc., Assn. 1 Duv. (Ky.) 143.

[4] Durkee *v.* People, 155 Ill. 354, 40 N. E. R. 626. See, also, Brewster *v.* Hartley, 37 Cal. 15, s. c. 99 Am. Dec. 237.

[5] Kent *v.* Quicksilver Min. Co., 78 N. Y. 159; Kennebec, etc., R. Co. *v.* Kendall, 31 Me. 370; Williams *v.* Great Western R. Co., 10 Exch. 15; Chandler *v.* Northern Cross R. Co., 18 Ill. 190; American Livestock Co. *v.* Chicago, etc., Exchange, 143 Ill. 210, s. c. 36 Am. St. R. 385.

[6] Hayden *v.* Noyes, 5 Conn. 391. But see Goddard *v.* Merchants' Exchange, 9 Mo. App. 290. By-laws which are vexatious, unequal, oppressive, and manifestly detrimental

is for the court, and it is held that the jury can not hear evidence as to its effects offered in proof of the claim that it is unreasonable.[1] A by-law can never be valid where it impairs the obligation of a contract,[2] nor where it amounts to a retrospective or *ex post facto* rule,[3] nor where it deprives the holder of any of his property rights.[4] The right given by statute to vote by proxy is a substantial right and can not be taken away, or even materially abridged, by any corporate by-law.[5] Neither will a by-law be sustained if, under the guise of regulating the mode of transfer, it unreasonably restricts the power to transfer shares;[6] or if it forbids the member to seek legal redress in the

to the interests of the corporation are void. Gosling *v.* Veley, 12 Q. B. 328; People *v.* Medical Society, 24 Barb. (N. Y.) 570; City of Chicago *v.* Rumpff, 45 Ill. 90, s. c. 92 Am. Dec. 196.

[1] Commonwealth *v.* Worcester, 3 Pick. (Mass.) 462; Morris, etc., R. Co. *v.* Ayres, 29 N. J. Law 393, s. c. 80 Am. Dec. 215; Illinois Cent. R. R. Co. *v.* Whittemore, 43 Ill. 420; Merz *v.* Missouri Pac. R. R. Co., 14 Mo. App. 459; People *v.* Throop, 12 Wend. (N. Y.) 182; 1 Elliott's Gen. Pr., § 436. Its unreasonableness must be demonstrated. Hibernia, etc., Co. *v.* Harrison, 93 Pa. St. 264; Paxon *v.* Sweet, 13 N. J. Law (1 Green) 196. But see Day *v.* Owen, 5 Mich. 520, holding that the reasonableness of a by-law should be left to the jury under proper instructions from the court. See, also, Pittsburgh, etc., R. R. Co. *v.* Lyon, 123 Pa. St. 140, s. c. 10 Am. St. R. 517. *Post*, § 202.

[2] Such a by-law would be contrary to the constitution of the United States. U. S. Const., Art. 1, § 10; Stuyvesant *v.* New York, 7 Cowen (N. Y.) 588; Kennebec, etc., R. R. Co. *v.* Kendall, 31 Me. 470. See, also, Flint *v.* Pierce, 99 Mass. 68, s. c. 96 Am. Dec. 685, 691; note to Freeland *v.* McCullough, 43 Am. Dec. 694; Bergman *v.* St. Paul, etc., Ass'n, 29 Minn. 275.

[3] U. S. Const., Art. 1, § 10; Howard *v.* Savannah, T. Charlt. (Ga.) 173, (holding a municipal by-law void at common law for this reason); People *v.* Fire Department, 31 Mich. 458; Great Falls Ins. Co. *v.* Harvey, 45 N. H. 292.

[4] Kent *v.* Quicksilver Min. Co., 78 N. Y. 159, where preferred stock had been issued. Taylor *v.* Griswold, 14 N. J. Law 222, where an attempt was made to give a vote for each share of stock, and so deprive the small stockholders of an equal voice in the management of its affairs. See Stimson's Am. Stat. (1886), §§ 91, 92 and 93; Gray *v.* Portland Bank, 3 Mass. 364, s. c. 3 Am. Dec. 156; People *v.* Crockett, 9 Cal. 112; Budd *v.* Multnomah St. Ry. Co., 15 Ore. 413, s. c. 3 Am. St. R. 169; *In re* Long Island R. Co., 19 Wend. (N. Y.) 37, s. c. 32 Am. Dec. 429. The last two cases hold a by-law forfeiting shares invalid.

[5] People's Home Sav. Bank *v.* Superior Court, 104 Cal. 649, s. c. 43 Am. St. Rep. 147; Matter of Lighthall Mfg. Co., 47 Hun (N. Y.) 258.

[6] Sargent *v.* Franklin Ins. Co., 8 Pick. (Mass.) 90; Moore *v.* Bank of

courts;[1] for such by-laws would attack rights with which the states themselves are prohibited from interfering,[2] and a corporation can not, under a grant of power from a state, do what the state itself has no power to do. And so the repeal of a by-law can not divest rights acquired under it while it continued in force.[3] If the by-law be separable in its character, valid provisions contained in it may stand, although it contains others which are void.[4]

§ 194. **Power to make by-laws resides in stockholders — When directors may make.**—The power to make by-laws resides in the members of the corporation at large, where there is no law or valid usage to the contrary.[5] But it is frequently provided by charter[6] or by general statute[7] that this power shall be exercised by the directors; and where there is no provision on the subject the stockholders may delegate to the directors authority to make all necessary by-laws.[8]

§ 195. **Formalities of enactment—Proof.**—By-laws are not generally required in this country to be enacted or promulgated in any particular form, but only to be enacted at a legal meeting of the corporation.[9] And the jury may find a by-law,

Commerce, 52 Mo. 377; Farmers', etc., Bank *v.* Wasson, 48 Iowa 336, s. c. 30 Am. R. 398.

[1] Amesbury *v.* Bowditch, etc., Co., 6 Gray (Mass.) 596; Bauer *v.* Sampson Lodge, 102 Ind. 262, s. c. 1 N. E. R. 571 and authorities there cited; Angell & Ames on Corp. (8th ed.), § 341.

[2] U. S. Const., Art. 1, § 10.

[3] Kent *v.* Quicksilver Min. Co., 78 N. Y. 159, 182. See, also, Wist *v.* Grand Lodge, 22 Ore. 271, s. c. 29 Am. St. R. 603; Supreme Lodge K. P. *v.* Knight, 117 Ind. 489.

[4] Amesbury *v.* Bowditch, etc., Ins. Co., 6 Gray (Mass.) 596; Shelton *v.* Mayor, 30 Ala. 540, s. c. 68 Am. Dec. 143; Rogers *v.* Jones, 1 Wend. (N. Y.) 237 s. c. 19 Am. Dec. 493. But not if the by-law must be taken as an entirety so that the invalid part vitiates the whole. State *v.* Curtis, 9 Nev. 325.

[5] Morton G. R. Co. *v.* Wysong, 51 Ind. 4, 12; Martin *v.* Nashville, etc., Assn. 2 Coldw. (Tenn.) 418; Bank of Holly Springs *v.* Pinson, 58 Miss. 421, s. c. 38 Am. R. 330; Angell & Ames on Corp. (8th ed.), § 327.

[6] See Union Bank of Maryland *v.* Ridgely, 1 Harris & G. (Md.) 324, and Fairfield Turnp. Co. *v.* Thorp, 13 Conn. 173.

[7] Stimson's Am. St. (1892), §§ 8073, 8537.

[8] State *v.* Overton, 24 N. J. L. 435; *Ex parte* Willcocks, 7 Cow. (N. Y.) 402, s. c. 17 Am. Dec. 525; Cahill *v.* Kalamazoo Mut. Ins. Co., 2 Doug. (Mich.) 124, s. c. 43 Am. Dec. 457.

[9] 1 Redfield on Railways (5th ed.),

its terms and adoption, from the usage of the corporation, in the absence of other evidence, no particular form of adoption being prescribed,[1] and it being shown that no record evidence of the adoption of such by-laws is in existence. But, in general, it is necessary, in order to prove what they are, that the by-laws themselves shall be produced, and parol proof of their contents by an officer of the corporation is insufficient.[2] Where the charter or a general statute[3] prescribes the mode in which by-laws shall be made and adopted in order that they may be valid, that mode must be pursued.[4] Thus, in England, by-laws are generally required to be made under corporate seal,[5] and in California and other states which follow its code, all by-laws adopted must be certified by a majority of the directors and by the secretary of the corporation, and copied in a legible hand in the "book of by-laws" to be kept in the corporate office for public inspection; and no by-law shall take effect until so copied.[6] When the books of the corporation, in which it is proved that the by-laws of the corporation are registered, are produced, they are held to be evidence of the existence and terms of such by-laws in all courts of justice.[7]

§ 196. **Amendment and repeal.**—Of course, the same body (whether stockholders or directors) that may enact by-laws

96. But the written assent of the holders of two-thirds of the capital stock is effectual to adopt a code of by-laws without a meeting for that purpose in several of the states. Stimson's Am. St. (1892), § 8072.

[1] Union Bank *v.* Ridgely, 1 Harris & G. 324. So they may find any act of the directors to have been duly performed if the statute does not prescribe the manner of its performance and that record evidence of such performance shall be preserved. Langsdale *v.* Bonton, 12 Ind. 467; McCabe *v.* Board, etc., 46 Ind. 380. See Fairfield T. Co. *v.* Thorp, 13 Conn. 173.

[2] Lumbard *v.* Aldrich, 8 N. H. 31.

[3] See Stimson's Am. St. Law (1892), § 8072.

[4] Angell & Ames on Corp. (8th ed.) § 328; Dunston *v.* Imperial Gas Light Co., 3 Barn. & Adol. 125.

[5] Angell & Ames on Corp. (8th ed.), § 328.

[6] Stimson's Am. Stat., § 8072.

[7] Case of Thetford, 1 Salk 192, 12 Vin. Abr. 90. In Maryland a copy of a by-law of a corporation of that state, under the corporate seal, and purporting to be signed by the president, secretary, or treasurer of the corporation, is made *prima facie* evidence of its adoption and terms. Pub. Gen. Laws Md., 1888, Ch. 23, § 4.

may repeal them or enact others in their stead.[1] And it seems that the repeal of a by-law may be proved by showing a course of conduct inconsistent therewith in a manner similar to that by which its adoption is shown by usage.[2] So, of course, amendments may be made in the by-laws.[3] But by-laws upon the faith of which and under which vested rights have been acquired by a member can not be so amended or repealed as to impair such rights.[4]

§ 197. **Enforcement of by-laws.**—The power to make by-laws necessarily implies the power to enforce them by pecuniary penalties, competent and proportionable to the offense.[5] But such power is often specially conferred by charter or by statute.[6] The penalty must, however, be reasonable and certain,[7] and can not be enforced by a forfeiture of shares[8] without statutory authority.

§ 198. **Rules and regulations in England.**—In England rules for the government of the railroad employes, in their dealings with the public, and of the passengers and others transacting business with the company, are called by-laws;[9] and under many of the special charters granted in that country, as well as under the Companies' Clauses Consolidation Act of 1845, the railroad companies are authorized to enact regulations which resemble the by-laws or ordinances of municipal corporations. Their control over persons coming

[1] The power to make by-laws generally implies the power to repeal them. King *v.* Ashwell, 12 East. 22; Kent *v.* Quicksilver, etc., Co., 78 N. Y. 159. But see Stevens *v.* Davison, 18 Gratt. (Va.) 819.

[2] Attorney-General *v.* Middleton, 2 Ves. Sen. 327. See, also, Henry *v.* Jackson, 37 Vt. 431.

[3] Schrick *v.* St. Louis, etc., Co., 34 Mo. 423.

[4] Kent *v.* Quicksilver, etc., Co., 78 N. Y. 159. Compare East Tenn., etc., R. Co. *v.* Gammon, 5 Sneed (Tenn.) 567.

[5] Angell & Ames on Corp., § 360.

[6] Stimson's Am. Stat. (1892), § 8071.

[7] Cahill *v.* Kalamazoo, etc., Co., 2 Doug. (Mich.) 124, s. c. 43 Am. Dec. 457; Mobile *v.* Yuille, 3 Ala. 137, s. c. 36 Am. Dec. 441; Grant Corp., 84; 1 Thomp. Corp., § 1040.

[8] *Re* Long Island R. R. Co., 19 Wend. (N. Y.) 37, s. c. 32 Am. Dec. 429; Budd *v.* Multnomah St. Ry. Co., 15 Ore. 413, s. c. 3 Am. St. R. 169; Kirk *v.* Nowill, 1 Term R. 118.

[9] Chilton *v.* The London, etc., R. Co., 16 M. & W. 212, 5 Eng. Railway and Canal Cas. 4.

upon their property and their right to regulate such matters extend to the imposition of penalties for failure to observe such regulations, which may even be enforced by imprisonment.[1] Such rules or by-laws must be made under the common seal of the corporation, and, so far as they affect those who are not officers or servants of the company, should be approved by the board of trade or railway commissioners.[2] A copy of these by-laws must be furnished to every officer and servant of the company, liable to be affected thereby. And in many instances, power to bind parties dealing with the company is granted on condition that the by-laws or regulations adopted shall be written or printed, and copies of them prominently displayed at all stations.[3] While the rules are required to be so adopted and promulgated there is a tendency to hold the corporation not liable for acts of its servants done in contravention of such rules. Thus it was held that the company was not liable in a case where the station clerk informed the plaintiff that he could use his excursion ticket for return passage by a certain train, which, however, did not run clear through, and the plaintiff was arrested by the superintendent for refusing to pay the extra fare demanded for his passage on such train.[4] And the company was also held not liable for the arrest by its inspector of an innocent man upon a charge of having no ticket, refusing to pay fare, being intoxicated, and assaulting the inspector, in violation of the company's regulations, even though the solicitor of the company attended to conduct the

[1] Chilton *v.* London, etc., R. Co., 16 M. & W. 212. See Hodges, 453, for the by-laws most generally adopted in England.

[2] Hodges, 552, 553. In the code of by-laws framed by the board of trade and generally adopted in England, it is provided that every person attempting to evade the payment of all or a part of his fare, and every person smoking, being intoxicated, committing a nuisance, or interfering with the comfort of other passengers, or obstructing the company's servants in the discharge of their duty, shall be liable to a penalty of forty shillings, and (in all but the first instance) forfeiture of the fare paid and eviction from the company's premises. And any person willfully injuring the company's carriages shall be liable to a penalty of not more than £5, in addition to the damage done. Hodges 453.

[3] Great Western R. Co. *v.* Goodman, 11 Eng. L. & Eq. 546.

[4] Roe *v.* Birkenhead, etc., R., 7 Eng. L. & Eq. 546, 6 Eng. Railway and Canal Cas. 795.

proceedings at the hearing before the magistrate, but without knowledge of the facts.[1] But these cases would seem to be opposed to the rule which obtains generally throughout this country, that it makes no difference, as to binding the company, that the agent disobeyed his superior, even though it was willfully done,[2] so long as he was acting within the scope of his employment.[3]

§ 199. Distinction between by-laws and rules and regulations — Right of railroad company to make rules and regulations.—In this country there is a clearly recognized distinction between, on the one hand, by-laws for the government of the members and officers in their dealings with the corporation, which must be adopted by the body of stockholders, or by the directors; and, on the other hand, regulations for the government of the company's employes and servants engaged in operating the road and of passengers and others of the public transacting business with the company or dealing in any manner with the company's property,[4] which may usually be made by any officer or agent of the corporation duly authorized to control the business or property to which they relate.[5] A railroad company has an implied authority (which is necessarily almost absolute)[6] to make and enforce all reasonable

[1] Eastern Counties R. *v.* Broom, 2 Eng. L. & Eq. 406; Roe *v.* Birkenhead R., 7 Exch. 36.

[2] Weed *v.* Panama R. Co., 5 Duer (N. Y.) 193. *Post*, § 213.

[3] Philadelphia, etc., R. Co. *v.* Derby, 14 How. (U. S.) 468, 483; Higgins *v.* Watervliet, etc., R. Co., 46 N. Y. 23. Whether the agent was acting within the scope of his authority is generally for the jury to determine from the evidence. McKernan *v.* Manhattan R. Co., 22 Jones and S. (N. Y. Super. Ct.) 354.

[4] State *v.* Overton, 24 N. J. L. 435, s. c. 61 Am. Dec. 671; Morris, etc., R. Co., *v.* Ayres, 29 N. J. L. 393; Commonwealth *v.* Power, 7 Met. 596, 601.

[5] Smith *v.* Chamberlain. 38 S. C. 529, 17 S. E. R. 371, s. c. 19 L. R. A. 710, 32 Am. L. Reg. (N. S.) 747; Commonwealth *v.* Power, 7 Met. (Mass.) 596, s. c. 41 Am. Dec. 465, holding that a superintendent of a railway station may make reasonable rules for the control of the buildings and grounds, and for the regulation of conduct of persons coming upon such grounds. Markham *v.* Brown, 8 N. H. 523, to the same effect; Vedder *v.* Fellows, 20 N. Y. 126, per Strong, J.: "The conductors, in the absence of any directions from their superior officers, have a right, and, indeed, it is obligatory upon them, to adopt some rule relative to the surrender of the tickets of the passengers."

[6] Hibbard *v.* New York, etc., R. Co., 15 N. Y. 455.

rules and regulations for the control of its trains and the persons thereon, of persons using its stations and grounds, and of those transacting business with it, in order to provide for the safety of its passengers and employes, and to protect itself from imposition and wrong.[1]

§ 200. **Examples of rules and regulations which railroad companies may make.**—To this end they may regulate the purchase of tickets, the time and manner of procuring and paying for the same, and the time and manner of surrendering them; the manner and time of entering and leaving the cars; and the conduct of the passengers while upon the cars or at stations waiting for trains, as that they shall not be boisterous or disorderly, shall do nothing to obstruct the conductors or other employes in the discharge of their duties, and shall be seated in the cars while the train is in motion.[2] Thus, where a reasonable opportunity is afforded for the purchase of tickets, they may enact and enforce a rule requiring the payment of an additional sum by those who do not purchase tickets before entering the car, and a regulation providing that ten cents extra shall be paid in such a case over and above the regular ticket fare, is reasonable and valid.[3] So, they may require the production of a ticket and its exhibition to the conductor at proper times as evidence of the right to passage.[4] And a rule

[1] Crocker *v.* New London, etc., R. Co., 24 Conn. 249; Pittsburg, etc., R. Co. *v.* McClurg, 56 Pa. St. 294; Southern R. Co. *v.* Kendrick, 40 Miss. 374; Cleveland, etc., R. Co. *v.* Bartram, 11 Ohio St. 457; Stephen *v.* Smith, 29 Vt. 160; Reese *v.* Pennsylvania R. Co., 131 Pa. St. 422, s. c. 19 Atl. R. 72, 1 Lewis's Am. R. R. & Corp. Cas. 147; Dickerman *v.* St. Paul Union Depot Co., 44 Minn. 433, 3 Lewis Am. R. R. & Corp. Cas. 374, and note, 46 N. W. Rep. 907.

[2] Hibbard *v.* New York, etc., R. Co., 15 N. Y. 455, and cases in last note *supra*.

[3] Reese *v.* Pennsylvania R. Co., 131 Pa. St. 422, s. c. 19 Atl. R. 72, 1 Lewis's Am. R. R. & Corp. R. 147; Sage *v.* Evansville, etc., R. R. Co., 134 Ind. 100, s. c. 33 N. E. R. 771; Crocker *v.* New London, etc., Railroad Co., 24 Conn. 249; Swan *v.* Manchester, etc., Railroad Co., 132 Mass. 116; Forsee *v.* Alabama, etc., Railroad Co., 63 Miss. 67; State *v.* Hungerford, 39 Minn. 6, s. c. 38 N. W. R. 628; Hilliard *v.* Goold, 34 N. H. 230; State *v.* Goold, 53 Me. 279; Pullman Co. *v.* Reed, 75 Ill. 125; Stephen *v.* Smith, 29 Vt. 160; Snellbaker *v.* Paducah, etc., R. Co., 94 Ky. 597, 23 S.W. R. 509. See, also, Manning *v.* Louisville, etc., R. Co., 95 Ala. 92, s. c. 36 Am. Stat. R. 225.

[4] Van Dusan *v.* Grand Trunk R. Co., 97 Mich. 439, s. c. 56 N. W. R. 848;

requiring passengers to make a continuous trip, unless they procure a "stop-over" ticket or check, is reasonable and valid.[1] A railroad company may also make and enforce a rule forbidding passengers to be carried on freight trains,[2] where it sufficiently provides for their accommodation on passenger trains, and, if it permits passengers on freight trains, it may, after due notice of the rule, require such passengers to provide themselves with a particular kind of ticket which it has given them a reasonable opportunity to obtain.[3] It is likewise held, in the absence of any statutory provision to the contrary, that a railroad company may adopt rules providing that particular trains shall stop only at certain stations, where it furnishes reasonable means of reaching all stations on its road by other trains, and that passengers are bound to take notice of such a rule as shown in the time-card published by the company.[4] Rules and regu-

Northern Cent. R. Co. *v.* O'Conner, 76 Md. 207, s. c. 35 Am. Stat. R. 422; Poole *v.* Northern Pac. R. Co., 16 Ore. 261, s. c. 8 Am. Stat. R. 289; Cresson *v.* Philadelphia, etc., R. Co., 11 Phila. (Pa.) 597; Nye *v.* Marysville, etc., St. R. Co., 97 Cal. 461, 32 Pac. R. 530; Chicago, etc., R. Co. *v.* Boger, 1 Bradw. (Ill.) 472; Baltimore, etc., R. Co. *v.* Blocher, 27 Md. 277; Frederick *v.* Marquette, etc., R. Co., 37 Mich. 342; Downs *v.* New York, etc., R. Co., 36 Conn. 287, s. c. 4 Am. R. 77; Jerome *v.* Smith, 48 Vt. 230, s. c. 21 Am. R. 125; Crawford *v.* Cincinnati, etc., R. Co., 26 Ohio St. 580; Ripley *v.* New Jersey, etc., Co., 31 N. J. L. 388; Townsend *v.* New York, etc., R. Co., 56 N. Y. 295, s. c. 15 Am. R. 419; Standish *v.* Narragansett, etc., Co., 111 Mass. 512, s. c. 15 Am. R. 66; Duke *v.* Great Western R. Co., 14 Upper Can. Q. B. 369, 377. See Watkins *v.* Pennsylvania R. Co., 21 Dist. of C. 1, 52 Am. & Eng. R. R. Cas. 159, and note.

[1] Cheney *v.* Boston, etc., R. Co., 11 Met. (Mass.) 121, s. c. 45 Am. Dec. 190 and note; Yorton *v.* Milwaukee, etc., R. Co., 54 Wis. 234, s. c. 41 Am. R. 23; Beebe *v.* Ayres, 28 Barb. (N. Y.) 275; Johnson *v.* Concord Ry., 46 N. H. 213.

[2] Chicago, etc., R. Co. *v.* Randolph, 53 Ill. 510; Houston, etc., R. Co. *v.* Moore, 49 Tex. 31; Eaton *v.* Delaware, etc., R. Co., 57 N. Y. 382.

[3] Evans *v.* Memphis, etc., R. Co., 56 Ala. 246; St. Louis, etc., R. Co. *v.* Myrtle, 51 Ind. 566; Arnold *v.* Illinois, etc., R. Co., 83 Ill. 273; Law *v.* Illinois, etc., R. Co., 32 Iowa 534; Kansas, etc., R. Co. *v.* Kessler, 18 Kan. 523; Burlington, etc., R. Co. *v.* Rose, 11 Neb. 177, s. c. 1 Am. & Eng. R. R. Cas. 253.

[4] Texas, etc., R. Co. *v.* Ludlam, 26 S. W. R. 430; Dietrich *v.* Pennsylvania, etc., R. Co., 71 Pa. St. 432, s. c. 10 Am. R. 711. "It is the duty of a party going upon a railroad train to inform himself when, where and how he can go or stop, according to the regulations of the railroad company." Ohio, etc., Co. *v.* Applewhite, 52 Ind 540, 546; Pittsburgh, etc., Co. *v.* Lightcap, 7 Ind. App. 249, 253; Chicago, etc., R. Co. *v.* Randolph, 53 Ill. 510; Gulf, etc.,

lations in regard to separate cars for ladies and their escorts,[1] or providing for the separation of white from colored passengers,[2] have also been upheld as reasonable where equal accommodations were offered to all. So has a rule that none but holders of first-class tickets shall ride on sleeping cars.[3] Railroad companies may also adopt and enforce rules prohibiting passengers from riding in the baggage or express cars or on the engines, platforms, or other improper places of danger,[4] and prohibiting disorderly conduct on the cars.[5] And they may exclude from their carriages and premises such persons as refuse to comply with their reasonable regulations.[6] Like reasonable rules may be made to govern the receipt, carriage, and delivery of freight and baggage, and the shipper may be compelled to conform to

R. Co. *v.* Henry, 84 Tex. 678, 52 Am. & Eng. R. R. Cas. 233; Jackson *v.* Grand Ave. R. Co., 118 Mo. 199, s. c. 24 S. W. R. 192; Beauchamp *v.* International, etc., Railway Co., 56 Tex. 239.

[1] Peck *v.* New York, etc., R. Co., 70 N. Y. 587; Marquette *v.* Chicago, etc., R. Co., 33 Iowa 562; Bass *v.* Chicago, etc., R. Co., 36 Wis. 450, s. c. 17 Am. R. 495; Memphis, etc., R. Co. *v.* Benson, 85 Tenn. 627.

[2] West Chester, etc., R. Co. *v.* Miles, 55 Pa. St. 209; Green *v.* City of Bridgeton, 9 Cent. L. J. 206; *Ex parte* Plessy, 45 La. Ann. 80, 18 L. R. A. 639, and note.

[3] Pullman Palace Car Co. *v.* Lee, 49 Ill. App. 75, and the company may charge extra compensation for a seat in a chair car, even to the holder of a first-class ticket. St. Louis, etc., R.R. Co. *v.* Hardy, 55 Ark. 134, s. c. 52 Am. & Eng. R. Cas. 224.

[4] Florida Southern R. Co. *v.* Hirst, 30 Fla. 1, 52 Am. & Eng. R. R. Cas. 409, s. c. 16 L. R. A. 631, and note; Robertson *v.* New York, etc., R. Co., 22 Barb. (N. Y.) 91; O'Neill *v.* Lynn, etc., R. Co., 155 Mass. 371, s. c. 29 N. E. R. 630; Pennsylvania R. Co. *v.* Langdon, 92 Pa. St. 21, s. c. 37 Am. R. 651.

[5] See Pittsburg, etc., R. Co. *v.* Pillow, 76 Pa. St. 510; New Orleans, etc., Co. *v.* Burke, 53 Miss. 200; Jencks *v.* Coleman, 2 Sumn. (U. S.) 221.

[6] Murphy *v.* Union R. Co., 118 Mass. 228; Putnam *v.* Broadway, etc., R. Co., 55 N. Y. 108, s. c. 14 Am. R. 190; Commonwealth *v.* Power, 7 Met. (Mass.) 596; Louisville, etc., R. Co. *v.* Johnson, 92 Ala. 204; McKernan *v.* Manhattan R. Co., 54 N. Y. Super. Ct. 354; Louisville, etc., R. Co. *v.* Logan, 88 Ky. 232; Pittsburg, etc., R. Co. *v.* Pillow, 76 Pa. St. 510. A railroad company may, at its option, exclude all persons coming upon its premises for purposes other than transacting business with the company. Hotel runners, Com. *v.* Power, 7 Met. (Mass.) 596, s. c. 41 Am. Dec. 465, and note; Landrigan *v.* State, 31 Ark. 50. Porters, Barney *v.* Oyster Bay, etc., Co., 67 N. Y. 301; The D. R. Martin, 11 Blatch C. C. 233. Omnibus driver, Barker *v.* Midland R. Co. 18 C. B. 46; Summitt *v.* State, 8 Lea (Tenn.) 413. Harris *v.* Stevens, 31 Vt. 79.

them in transacting business with the company.[1] Thus, a railroad company may require persons hauling freight from its depot to take it from the platform, where it is delivered to them by the company's agents, and to transact business over the counter, without entering the warehouse to check off the freight.[2] So, it is now established in most jurisdictions by the weight of authority, in accordance with the better reason, that it is competent for a railroad company to adopt and enforce a reasonable regulation, fixing the time within which a consignee shall unload his freight after notice of its arrival and providing a reasonable charge per day thereafter for car service or by way of demurrage.[3] As will hereafter appear, however, a common carrier can make no unreasonable and unjust discrimination between its customers,[4] and some regulations that it might otherwise make are prohibited by the interstate commerce law. Rules affecting passengers and shippers are not the only rules which a railroad company has the power to make. It is not only the right, but it is also the duty of railroad companies to promulgate and enforce reasonable and necessary rules for the safety of its employes, in the management and operation of its

[1] Southern R. Co. *v.* Kendrick, 40 Miss. 374; Pittsburgh, etc., R. Co. *v.* Lyon, 123 Pa. St. 140; Morris & E. R. Co. *v.* Ayres, 29 N. J. L. 393; Randall *v.* Richmond, etc., R. Co., 108 N. Car. 612, s. c. 13 S. E. R. 137. As to when the customer is not bound to take notice of rules see Central R., etc., Co. *v.* Skellie, 90 Ga. 694, s. c. 16 S. E. R. 657; Southern Exp. Co. *v.* Crook, 44 Ala. 468; Atchison, etc., R. Co. *v.* Miller, 16 Neb. 661, s. c. 21 N. W. R. 451.

[2] Such a regulation is reasonable. Donovan *v.* Texas, etc., R. Co., 64 Tex. 519, s. c. 29 Am. & Eng. R. R. Cas. 320.

[3] Norfolk and Western R. Co. *v.* Adams, (Va.), 18 S. E. R. 673, s. c. 56 Am. & Eng. R. R. Cas. 330; Miller *v.* Georgia, etc., R. Co., 88 Ga. 563, s. c. 15 S. E. R. 316; Miller *v.* Mansfield, 112 Mass. 260; Kentucky Wagon, etc., Co *v.* Louisville, etc., Co., 11 Ry. & Corp. B. J. 49. One dollar per day for each car was held reasonable in the first two cases above cited. But see Chicago & N. W. R. Co. *v.* Jenkins, 103 Ill. 588; Burlington, etc., R. Co. *v.* Chicago Lumber Co., 15 Neb. 390.

[4] See Chicago, etc., R. Co. *v.* People, 56 Ill. 365; Hays *v.* Pennsylvania, etc., Co., 12 Fed R. 309; Logan *v.* Central R. Co., 74 Ga. 684; Rice *v.* Railroad Co., 3 Interstate Com. Com. R. 186; Cleveland, etc., R. Co. *v.* Closser, 126 Ind. 348, s. c. 26 N. E. R. 159, 22 Am. St. R. 593, and authorities there cited; Root *v.* Long Island R. Co., 114 N. Y. 300, s. c. 11 Am. St. R. 643, and exhaustive note. Article in 16 Am. L. Rev. 818; note to Commonwealth *v.* Power, 41 Am. Dec. 465, 484.

road.[1] This subject, however, will be fully considered hereafter.

§ 201. **Enforcement of rules—Penalties.**—Beyond exclusion from their premises and from the privilege of transacting business with them, railroad corporations have in this country very little authority to inflict penalties for disobedience of their rules, except so far as such penalties are prescribed by the statutes of the various states. But they are generally permitted, as we have seen, to exact a higher fare from passengers failing to procure tickets and seeking to pay their fare after getting upon the train,[2] provided such increased fare be reasonable. And the English courts have adjudged a by-law valid which required a passenger, not procuring or delivering up his ticket, to pay fare from the place whence the train originally started.[3] Such rules must be in accordance with the charter and not, it seems, in conflict with any of the numerous regulations prescribed by statute in the states through which the road runs or in which it does business,[4] and must, moreover, be reasonable.[5]

§ 202. **Reasonableness of rules—When a question of fact and when a question of law.**—The reasonableness of such regulations and of the manner of their enforcement in a given

[1] Lewis *v.* Seifert, 116 Pa. St. 628, s. c. 11 Atl. R. 514; Corcoran *v.* Delaware, etc., R. Co., 126 N. Y. 673, s. c. 27 N. E. R. 1022; Morgan *v.* Hudson River, etc., Co., 133 N. Y. 666, s. c. 31 N. E. R. 234; Pittsburgh, etc., R. Co. *v.* Henderson, 37 Ohio St. 549; Chicago & N. W. R. Co. *v.* Moranda, 93 Ill. 302; Ohio & M. R. Co. *v.* Collarn, 73 Ind. 261; Ford *v.* Fitchburg R. Co., 110 Mass. 240; Hough *v.* Railway Co., 100 U. S. 213.

[2] McGowen *v.* Morgan's Louisiana, etc., R. Co., 41 La. Ann. 732; State *v.* Hungerford, 39 Minn. 6; Reese *v.* Pennsylvania R. Co., 131 Pa. St. 422, s. c. 1 Lewis's Am. R. R. & Corp. Cas. 147, citing numerous authorities and holding that an additional charge of ten cents is not a "charge for transportation" within the meaning of a statute limiting the rate three and one-half cents per mile. *Ante*, § 200.

[3] Chilton *v.* London, etc., R. Co., 16 M. & W. 212, 5 Eng. Railw. and Canal Cas. 4. See, also, Manning *v.* Louisville, etc., R. Co., 95 Ala. 392, 52 Am. & Eng. R. Cas. 213.

[4] See *ante*, § 191. We do not mean, however, that a state law will control the authority of the United States over the road as an instrument of interstate commerce.

[5] Chicago & N. W. Ry. Co. *v.* Williams, 55 Ill. 185. *Ante*, § 193.

case has been held by some of the courts to be a question of fact for the jury.[1] But it would seem that this must be a question of law for the court to decide, if any fixed and permanent regulations are to be established, and the better authority holds it to be such; since one jury in a given case might pronounce the rule reasonable, while another jury in another case might decide the same rule to be unreasonable.[2] Yet, as any given case is apt to depend in part upon facts and circumstances which are themselves in dispute, some authorities hold that the question of the reasonableness of a rule as applied to the case in hand should be submitted to the jury, under proper instructions from the court, as a mixed question of law and fact,[3] and that it is for the court only where the facts are undisputed.[4] There are, doubtless, many cases in which the reasonableness of the rule depends, in the particular instance, upon disputed facts or circumstances, and, where this is true, it may, perhaps, be called a mixed question of law and fact; but, when the facts are undisputed, we think it is clear, both upon principle and according to the weight of authority, that the question is one of law for the court.[5]

[1] State *v.* Overton, 24 N. J. L. 435; Morris, etc., R. Co. *v.* Ayres, 29 N. J. L. 393; State *v.* Chovin, 7 Iowa 204; Texas, etc., R. Co. *v.* Adams, 78 Tex. 372, s. c. 14 S. W. R. 666; Prather *v.* Railway Co., 80 Ga. 427, s. c. 9 S. E. R. 530.

[2] Illinois Central R. Co. *v.* Whittemore, 43 Ill. 420; Chicago, etc., R. Co. *v.* McLallen, 84 Ill. 109 (holding, however, that its adequacy or sufficiency is for the jury); Hoffbauer *v.* Delhi, etc., R. Co., 52 Iowa 342; Louisville, etc., R. Co. *v.* Fleming, 14 Lea (Tenn.) 128; Maroney *v.* Old Colony, etc., R. Co., 106 Mass. 153; Yorton *v.* Milwaukee, etc., R. Co,. 54 Wis. 234; Pittsburgh, etc., R. Co. *v.* Nuzum, 50 Ind. 141; Fertich *v.* Michener, 111 Ind. 472, 481, s. c. 11 N. E. R. 605; South Florida R. Co. *v.* Rhoads, 25 Fla. 40, s. c. 23 Am. St. R. 506; Pierce *v.* Randolph, 12 Tex. 290; Vedder *v.* Fellows, 20 N. Y. 126; 1 Elliott's Gen. Pr., § 436.

[3] Day *v.* Owen, 5 Mich. 520; Bass *v.* Chicago, etc., R. Co., 36 Wis. 450; Brown *v.* Memphis, etc., R. Co., 4 Fed. R. 37; Redfield on Railways (5th ed.), 95; Thompson on carriers, § 335. See, also, Clason *v.* Milwaukee, 30 Wis. 316; Christian *v.* First Div. St. Paul, etc., R. Co., 20 Minn. 21.

[4] Commonwealth *v.* Power, 7 Met. (Mass.) 596; Pittsburgh, etc., R. Co. *v.* Lyon, 123 Pa. St. 140, s. c. 10 Am. St. R. 517.

[5] St. Louis, etc., R. Co. *v.* Hardy, 55 Ark. 134, s. c. 52 Am. & Eng. R. R. Cas. 224; Old Colony R. Co. *v.* Tripp, 147 Mass. 35, s. c. 17 N. E. R. 89; Louisville, etc., R. Co. *v.* Fleming, 14 Lea (Tenn.) 128; Wolsey *v.* Railroad Co., 33 Ohio St. 227; Hoffbauer *v.* Railway Co., 52 Ia. 342, s. c. 3 N. W. R. 121, and authorities cited in note 2, *supra*.

CHAPTER XI.

CORPORATE REPRESENTATIVES.

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§ 203. **Railroad corporations act through officers, agents or other representatives.**—It is elementary learning that corporations act through agents, officers, attorneys or servants. The nature of a corporation aggregate, as is well known, is such that it can only perform its corporate functions, duties and acts

through the medium of natural persons.[1] The creation of a railroad corporation invests it with power, without express words, to choose officers, agents, attorneys and servants.[2] In other words, the creation of a railroad company invests it, as an incidental power, with the authority to appoint officers and agents.

§ 204. **Appointment of officers and agents—General doctrine.**—As a general rule agents or servants may be appointed by railroad corporations in the same manner as agents and servants may be appointed by natural persons.[3] It is however to be understood that where the charter or act of incorporation provides the mode in which officers or agents shall be appointed that mode must be pursued. There may be cases where a departure from the mode prescribed by the charter or act of incorporation would not prejudice the rights of third persons, but the general rule is that where the mode is expressly prescribed by the charter or the act of incorporation the appointment will not be valid if there is a substantial or material departure from the prescribed mode.[4] To prevent misunderstanding we say that we are here outlining general doctrines and are not stating specific rules.

[1] New York, etc., Co. *v.* Schuyler, 34 N. Y. 30; Lyman *v.* White River, etc., Co., 2 Aik. (Vt.) 255, s. c. 16 Am. Dec. 705; Angell & Ames on Corporation (8th ed.), § 276.

[2] Protection Life Ins. Co. *v.* Foote, 79 Ill. 361, 368; Hurlbut *v.* Marshall, 62 Wis. 590; Kitchen *v.* Cape Girardeau, etc., Co., 59 Mo. 514; Alabama, etc., Co. *v.* Kidd, 29 Ala. 221; Wood *v.* Ontario, etc., Co., 24 U. C. C. P. 334.

[3] Hamilton *v.* Newcastle, etc., Co., 9 Ind. 359; Alabama, etc., Co. *v.* Kidd, 29 Ala. 221; Giles *v.* Taff Vale., R. Co., 2 El. & Bl. 822; Goff *v.* Great Northern, etc., Co., 3 El. & El. 672, 30 L. J. Q. B. 148; Santa Clara, etc., Co. *v.* Meredith, 49 Md. 389; Crowley *v.* Genessee, etc., Co., 55 Cal. 273; White *v.* State, 69 Ind. 273; Despatch Line, etc., *v.* Bellamy, etc., Co., 12 N. H. 205; Cook *v.* Kuhn, 1 Neb. 472; Fitch *v.* Lewiston Steam Mill Co., 80 Me. 34; Bank of Columbia *v.* Patterson, 7 Cranch 299; Randall *v.* Van Vechten, 19 Johns. 60; Reynolds *v.* Collins, 78 Ala. 94; Bancroft *v.* Wilmington, etc., Academy, 5 Houst. (Del.) 577.

[4] Henning *v.* United States Ins. Co., 47 Mo. 425; Salem Bank *v.* Gloucester Bank, 17 Mass. 1; Badger *v.* American, etc., Co., 103 Mass. 244; Beatty *v.* Marine Ins. Co., 2 Johns. 109; Card *v.* Carr, 1 C. B. N. S. 197; Kirk *v.* Bell, 16 Q. B. 290; Gordon *v.* Preston, 1 Watts, 385; Chicago, etc., Co. *v.* James, 22 Wis. 194. See Bridgeport Bank *v.* New York, etc., Co., 30 Conn. 231.

§ 205. **Statutory privileges bestowed on agents.**—Because of the entire reliance of a railroad corporation upon its servants for the discharge of its duties to the public, some of the older charters granted to them special privileges and exemptions. Privileges and exemptions granted corporate agents are generally regarded as bestowed upon the corporation and not upon persons who chance to be the corporate agents. Thus, it is held that an exemption of the servants of a corporation from military duty, serving on juries, and working on public roads, is not a mere personal privilege to the officers, agents and servants of the company, but is a right or privilege of the corporation, on which it may insist in favor of any servant whom it may employ.[1]

§ 206. **Officers generally.**—The most important of corporate agents are, of course, the officers,[2] without whom no business can be transacted by the corporation.[3] Indeed, in most acts for the incorporation of railroad companies, a choice of officers is one of the essential steps toward incorporation.[4] The power to choose officers is inherent in a corporation and implied from the fact of incorporation without being specially

[1] Johnson *v.* State, 88 Ala. 176, 41 Am. & Eng. R. Cas. 275; Zimmer *v.* State, 30 Ark. 677. The grant of such a privilege was held unconstitutional in Tennessee. Neely *v.* State, 4 Lea. (Tenn.) 316.

[2] Officers are but ministerial agents of the corporation. Dispatch Line, etc., *v.* Bellamy Mfg. Co., 12 N. H. 205; Burr *v.* McDonald, 3 Gratt. (Va.) 215. Officers may be invested with very comprehensive powers, but they are not the corporation. A corporation may entrust the conduct of its business to its officers, and may be bound by their acts, but no matter how extensive the powers conferred upon corporate officers, they are merely the representatives of the corporation, for that legal entity is the principal, and its officers are its agents or representatives.

[3] Gulf, etc., R. Co. *v.* Morris, 67 Tex. 692; Gashwiler *v.* Willis, 33 Cal. 11; Conro *v.* Port Henry, etc., Co., 12 Barb. (N. Y.) 27.

[4] Stimson's Am. Stat. (1892), §§ 8022, 8523, citing statutes of Pennsylvania, Wisconsin, Iowa, Minnesota, Kansas, Nebraska, Maryland, Kentucky, Texas, California, Nevada, Colorado, Washington, Dakota, Idaho, Montana, Wyoming, Utah, Florida, New Mexico, District of Columbia, Oklahoma, New Hampshire, Massachusetts, Maine, Vermont, Connecticut, Indiana, Illinois, Michigan, Arkansas, New York, Arizona, New Jersey, North Carolina, Missouri, Georgia.

granted.[1] This implied power is limited by the rule that the officers must be such as are necessary to the discharge of corporate functions and are necessary to enable the corporation to accomplish the object for which it was created.

§ 207. **Qualifications of officers.**—It is, of course, competent for the legislature to prescribe by charter the qualifications of corporate officers and to provide what persons shall or shall not be eligible to hold a corporate office. The legislative decision as to who shall be eligible is necessarily conclusive and not subject to review by the courts. The laws of several of the states prohibit any officer of a railroad corporation from becoming an officer of a parallel or competing line;[2] and some of the states make stockholders and owners of express and transporation companies ineligible to hold office or act as agents in any railroad company.[3] Ordinarily, any one may be an officer of a corporation who is competent to transact business for another, unless special qualifications are required by the charter or by-laws.[4]

§ 208. **Election of officers—Generally.**—Where the mode of choosing officers is not prescribed by the charter, they must, as a general rule, be chosen by the body of the corporators, or in such a mode as the corporators acting in accordance with the charter may prescribe.[5] Officers can exercise only the powers granted to them either expressly by the charter or by the by-laws, enacted pursuant to the charter, or implied by a declaration of the purposes of their appointment, or such as by necessary implication are conferred upon them. It was held at common law, that the

[1] Hurlbut *v.* Marshall, 62 Wis. 590; Terwilliger *v.* Gt. Western Tel. Co., 59 Ill. 249; Hughes *v.* Parker, 19 N. H. 181; *Ex parte* Wheeler, 2 Abb. Pr. N. S. (N. Y.) 361.

[2] Stimson's Am. Stat. (1892), § 8540, citing laws of Wisconsin, Missouri, Arkansas.

[3] Stimson's Am. Stat. (1892), § 8540, citing laws of Pennsylvania, Wisconsin, Missouri, Ohio. Pennsylvania and Missouri make it a misdemeanor for an officer or employe of a railroad to be interested in the business of transportation as a common carrier over such road.

[4] People *v.* Webster, 10 Wend. (N. Y.) 554.

[5] State *v.* Ancker, 2 Rich. L. (S. C.) 245.

power to appoint agents rests with the stockholders at large, but this doctrine is almost entirely swept away as to mere agents. It was also held that the courts can not judicially know that a particular board or body of a corporation not created by a public statute is authorized by the charter and by-laws to appoint agents, where no proof of the fact is introduced,[1] but this doctrine requires limitation and qualification. Principal governing officers, such as the members of the board of directors, must be chosen by the members of the corporation unless otherwise provided by the charter. All of the states make provision by their statutes for the incorporation of railroads for the choice of a board of directors, who are charged with the immediate government and direction of the affairs of the corporation,[2] and of a president usually chosen by them.[3] Many of the states provide that the directors shall also choose certain other officers, as vice-president,[4] secretary,[5] and treasurer;[6] while other states leave all officers and agents, as these states leave all but those enumerated, to be selected by the

[1] Angell & Ames (8th. ed.), § 277. It has been held that the court can not judicially know the authority and duties of officers of a railroad corporation where they are not defined by law. Brown *v.* Missouri, etc., R. Co., 67 Mo. 122. Nor of agents. Wood *v.* Chicago, etc., R. Co., 59 Iowa 196; McGowan *v.* St. Louis, etc., R. Co., 61 Mo. 528. But see Louisville, etc., R. Co. *v.* McVay, 98 Ind. 391, where the court noticed the duties and powers of a "general manager" without proof. And Sacalaris *v.* Eureka, etc., R. Co., 18 Nev. 155, where the court did the same as to a "superintendent." We think that the courts may take judicial notice of the powers and duties of many classes of officers and agents of railroad companies. It may be true that courts will not take judicial notice of the particular powers and duties of officers, but that they will take notice of the general scope and nature of the powers and duties of many classes of officers and agents is also true.

[2] Stimson's Am. Stat. (1892,, § 8043, 8532.

[3] Stimson's Am. Stat. (1892), §§ 8044, 8533.

[4] Stimson's Am. Stat. (1892),§§ 8044, 8533, citing laws of Ohio, Wisconsin, Dakota, Georgia, Florida, Oklahoma, Nevada, Arizona, New Jersey, Pennsylvania and Utah.

[5] Stimson's Am. Stat.(1892), §§ 8044, 8533, citing laws of Massachusetts, Vermont, Connecticut, New York, Wisconsin, Nebraska, Missouri, Nevada, Utah, North Carolina, New Mexico, Dakota, Montana, Arizona, Georgia, Oklahoma, Delaware, California, New Hampshire, Ohio, Kansas, Arkansas, Colorado, Wyoming, District Columbia.

[6] Stimson's Am. Stat. (1892), §§ 8044, 8533, citing laws of Nevada, Arizona, Massachusetts, Vermont, Connecticut,

directors in accordance with the by-laws that may be adopted, or in response to the apparent needs of the corporation.[1]

§ 209. **Agents generally.**—Agents are sometimes appointed for a term certain, though they are more often appointed to serve at the pleasure of the directors or principal officers. Except where some other provision is contained in the charter or by-laws, the directors have implied power to remove at any time agents appointed by them, subject to the rules which govern similar contracts between the agents of individuals and their principals.[2] But the authority of a duly appointed agent does not, necessarily, cease with the termination of the office of the board of directors by which he was appointed;[3] such authority, as a general rule, continues until revoked, unless a limit was placed upon its duration when granted.

§ 210. **Proof of the existence of the relation of principal and agent.**—The general rule is that the existence of the relation of principal and agent may be established by direct evidence or by facts and circumstances. Whether the relation exists is ordinarily, but not always, a question of fact.[4] As is well known, the relation of principal and agent can not be established by evidence of the declarations of the person claiming to act as agent,[5] nor can it be established by evidence of a

New York, Wisconsin, Nebraska, Ohio, North Carolina, Maryland, Dakota, Montana, Utah, Georgia, Florida, Oklahoma, New Mexico, Delaware, California, Kansas, Arkansas, Idaho.

[1] Stimson's Am. Stat. (1892), §§ 8044, 8533. Without express power granted to them, it is the right of the directors to appoint necessary officers and agents of the company, and to provide for the payment of compensation. Falkiner *v.* Grand Junction R. Co., 4 Ont. Rep. 350.

[2] Taylor on Priv. Corp. (2d ed.), § 650.

[3] Anderson *v.* Longden, 1 Wheat. (U. S.) 85; Northampton Bank *v.* Pepoon, 11 Mass. 288; Exeter Bank *v.* Rogers, 7 N. H. 21.

[4] Waterbury *v.* New York, etc., Co., 21 Blatchf. 314; McDougall *v.* Covert, 18 Up. Can. C. P. 119; St. Louis, etc., Co. *v.* Hendricks, 48 Ark. 177, s. c. 2 S. W. R. 783; Barrett *v.* Indianapolis, etc., Co., 9 Mo. App. 226; Missouri, etc., Co. *v.* Carpenter, 44 Kan. 257. See 1 Elliott's Gen. Pr. § 426. Where the facts are in controversy the question is for the jury. Franklin, etc., Co. *v.* Mackey, 83 Hun, 511, 31 N. Y. Sup. 1057; Baker *v.* Tibbetts, 162 Mass. 468, s. c. 39 N. E. R. 350.

[5] New England, etc., Co. *v.* Baxley, (S. C.) 21 S. E. R. 444; Burke *v.* Frye,

general understanding among business men.[1] The agents of the corporation not expressly named in the charter are usually appointed by the directors under their general authority to direct the affairs of the corporation.[2] Such an appointment should, when practicable, be proved by the records of the corporation, and can in no case be established by the acts of the assumed agent without proof that they were adopted or ratified by the corporation.[3] But, as a general rule, no formal resolution of the board of directors is required to appoint an agent or define his powers.[4] It is not necessary that the agent's authority be conferred by writing.[5] The fact of his agency may be proved by showing what he has been accustomed to do for his principal with the latter's acquiescence.[6]

§ 211. **Proof of authority.**—It is not enough, as a general rule, to prove the existence of the relation of principal and agent, but, ordinarily, there must be some evidence of the authority and its scope. In the case of general superior officers, as president, general manager, and the like, the court may infer, in a general way, the existence of authority. In the case of mere agents, where nothing has been done toward executing a contract made by one who assumes to act for the corporation, and damages for non-performance are sought to be recovered, the plaintiff must affirmatively show that the agent had author-

(Neb.) 62 N. W. R. 476; Brady *v.* Nagle, (Tex. Ct. App.) 29 S. W. R. 943; Taylor *v.* Second Av., etc., Co., 17 J. & S. (N. Y.) 513; Marvin *v.* Wilber, 52 N. Y. 270; Hirschmann *v.* Iron Range, etc., R. Co., 97 Mich. 384; Columbus, etc., Co. *v.* Powell, 40 Ind. 37; Lindsay *v.* Central, etc., Co., 46 Ga. 447.

[1] McGregor *v.* Hudson, (Tex. Ct. App.) 30 S. W. R. 489.

[2] For statute provisions to this effect see Stimson's Am. Stat. Law (1892), § 8533, citing the laws of twenty-two states.

[3] Waterman on Corp., 323.

[4] Bank of Lyons *v.* Demmon, Hill & D. Supp. (N. Y.) 398; Goodwin *v.* Union Screw Co., 34 N. H. 378. It may be made "by the usual course of business." Bank of Middlebury *v.* Rutland, etc., R. Co., 30 Vt. 159.

[5] Bank of Middlebury *v.* Rutland, etc., R. Co., 30 Vt. 159; Nicholas *v.* Oliver, 36 N. H. 218.

[6] Hamilton *v.* Newcastle, etc., R. Co., 9 Ind. 359; Whitney *v.* South Paris Mfg. Co., 39 Me. 316. His authority may be implied from his course of action and its ratification by the corporation. Perkins *v.* Washington Ins. Co., 4 Cow. (N. Y.) 645; Elysville Mfg. Co. *v.* Okisko Co., 1 Md. Ch. 392.

ity to bind the corporation.[1] Evidence that a person is an agent of the company is, ordinarily, not sufficient to establish his authority to bind the company by his acts, but, as a general rule, evidence that the relation of principal and agent exists must be supplemented by evidence showing the nature and extent of the agent's authority.[2]

§ 212. **Agency inferred.** — The law will often infer an agency from the general character of the acts which one assuming to act for the corporation has been permitted to do,[3] although they do not come strictly within the terms of his employment, and the agent will be held to possess the power to bind his principal within the limits of the authority with which he has apparently been clothed by the principal in respect to the subject-matter.[4] The corporation will, as a general rule, be bound by the acts of an agent whom it has permitted to pursue a particular line of conduct for a considerable period without objection.[5] Thus, where the board of managers of a railroad company permitted the president to assume entire control of the business of the company for three years, and to

[1] Fister *v.* LaRue, 15 Barb. 323; Atlantic Co. *v.* Vigilancia, 73 Fed. 452.

[2] Bonnell *v.* State, 64 Ind. 498; Brown *v.* Missouri, etc., Co., 67 Mo. 122; McGowan *v.* St Louis, etc., Co., 61 Mo. 528; Highland Av., etc., Co. *v.* Walters, 91 Ala. 435, 8 So. R. 57; Chattanooga, etc., Co. *v.* Liddell, 85 Ga. 482, s. c. 21 Am. St. R. 169; Nall *v.* Louisville, etc., Co., 129 Ind. 260, 264.

[3] Isbell *v.* Brinkman, 70 Ind. 118; Hotchin *v.* Kent, 8 Mich. 526; Washburn *v.* Nashville, etc., R. Co., 3 Head (Tenn.) 638; Alabama, etc., R. Co. *v.* Kidd, 29 Ala. 221; Perkins *v.* Portland, etc., R. Co., 47 Me. 573; Tanner *v.* Oil Creek R. Co., 53 Pa. St. 411.

[4] Pickering *v.* Busk, 15 East. 38; Columbus, etc., R. Co. *v.* Powell, 40 Ind. 37; Louisville, etc., R. Co. *v.* McVay, 98 Ind. 391; Alabama, etc., R. Co. *v.* Kidd, 29 Ala. 221; City of Covington *v.* Covington Bridge Co., 10 Bush. (Ky.) 69; Mechanics' Bank *v.* New York, etc., R. Co., 13 N. Y. 599. And authority to act in a certain matter will carry with it authority to bind the corporation in all things incident thereto. Bodine *v.* Exchange Fire Ins. Co., 51 N. Y. 117; Newell *v.* Smith, 49 Vt. 255.

[5] Caldwell *v.* Nat. Mohawk Valley Bank, 64 Barb. (N. Y.) 333. A single recognition of a single act of an assumed agent, if sufficiently unequivocal, positive and comprehensive in its character, may be sufficient to establish an agency to do other similar acts. Wilcox *v.* Chicago, etc., R. Co., 24 Minn. 269.

make such purchases for the company as he deemed necessary, giving notes and corporate securities in payment, and at the end of the three years assumed control of the road, together with all the property so acquired, and continued to use it without questioning the manner in which it was obtained, the company was held bound by all the acts of the president during the time he held control of its road.[1] But, unless his authority is shown to have been enlarged by the course of business which the corporation has permitted him to pursue, or by ratifying acts not embraced in his original authority,[2] an agent under a general appointment to do specified things has only limited special powers.[3]

§ 213. **Powers, duties and authority of officers and agents generally.**—An attempt is made in some of the states to outline the duties of certain officers of railroad companies, but most of the states leave this matter to be controlled by the by-laws. As between themselves and the corporation, the officers and agents have only such powers as are directly or impliedly conferred upon them by the charter, or by the terms of their appointment.[4] Where the charter provides that certain powers of the corporation shall be exercised by particular officers or agents, only such officers or agents may exercise them, and any attempt by other persons to bind the corporation by the exercise of such powers will ordinarily be voidable,[5] but there may be circumstances which will prevent the corporation from avoiding the acts of such officers or agents. The general rule is that where the duties of an officer or agent are defined by law, or prescribed in the charter or articles of association, or established by usage, a person dealing with the corporation is bound to know the limitations upon his authority thus deter-

[1] Olcott *v.* Tioga R. Co., 27 N. Y. 546. And see Kelley *v.* Newburyport, etc., Horse R. Co., 141 Mass. 496.

[2] Commonwealth *v.* Ohio, etc., R. Co., 1 Grants' Cas. (Penn.) 329, and cases cited in preceding notes.

[3] Wilson *v.* Genesee Mut. Ins. Co., 14 N. Y. 418.

[4] Angell & Ames on Corp. (8th ed.), § 280.

[5] Union Mut. F. Ins. Co. *v.* Keyser, 32 N. H. 313.

mined.[1] It has been held by some of the courts that he must, in doubtful cases, acquaint himself with the extent of such authority, or submit to the consequences of an omission to do so.[2] As between the corporation and third persons, where the agent's power is not limited by the charter or by positive law, the corporation will be held bound by his acts performed within the scope of his apparent authority; and this is true not only of his contracts, but of all his other acts and omissions.[3] Thus

[1] Adriance *v.* Roome, 52 Barb. (N. Y.) 399; State *v.* Commercial Bank, 14 Miss. 218; Ernest *v.* Nicholls, 6 H. L. Cas. 401. Persons dealing with the officers of a corporation, or with persons assuming to represent it, are chargeable with notice of the purpose of its creation and its powers and with the authority, actual or apparent, of its officers or agents with whom they deal. Wilson *v.* Kings County Elev. R. Co., 24 N. Y. S. R. 81, 114 N. Y. 487, 21 N. E. R. 1015; Bocock *v.* Alleghany Coal & Iron Co., 82 Va. 913, 1 S. E. R. 325; Whitehurst *v.* Whitehurst, 83 Va. 153, 1 S. E. R. 801; Memphis, etc., Elevator Co. *v.* Memphis & C. R. Co., 85 Tenn. 703, 4 Am. St. Rep. 798, 5 S. W. R. 52.

[2] Risley *v.* Indianapolis, etc., R. Co., 1 Hun (N. Y.) 202, in which there is a dictum to the effect that one contracting with an officer of the corporation must be informed as to his powers set forth in the by-laws. But the principle upon which the case is based is that one dealing with a corporation must ascertain with certainty the authority of a person professing to act for the corporation unless he has been held out by the corporation as possessing the powers in question or has before acted for it in the same capacity; and failing to do this he must abide the consequences of his neglect. Adriance *v.* Roome, 52 Barb. (N. Y.) 399; Salem Bank *v.* Gloucester Bank, 17 Mass. 1.

[3] Ranger *v.* Great Western R. Co., 5 H. L. Cas. 72; Reed *v.* Home Savings Bank, 130 Mass. 443; Chestnut Hill, etc., Co. *v.* Rutter, 4 Serg. & R. 6; Washburn *v.* Nashville, etc., Co., 3 Head. (Tenn.) 638; Nashville, etc., Co. *v.* Carroll, 6 Heisk. (Tenn.) 347; Clouse *v.* Canada Southern, etc., Co., 4 Ont. 28, s. c. 14 Am. & Eng. R. R. Cases 456; Langan *v.* Great Western, etc., Co., 30 L. T. (N. S.) 173; Cedar Rapids, etc., Co. *v.* Stewart, 25 Iowa 115; New York, etc., Co. *v.* Bates, 68 Md. 184, s. c. 11 Atl. R. 705; Olcott *v.* Tioga, etc., Co., 27 N.Y. 546; Hirschmann *v.* Iron Range, etc., Co., 97 Mich. 384; Ecker *v.* Chicago, etc., Co., 8 Mo. App. 223. If an agent is invested with the *indicia* of authority, the company will be liable to innocent third persons for the acts of the agent within the scope of the authority with which he appears to be clothed, although he may transcend his actual authority or violate instructions, but this rule does not prevail where the authority of the agent is prescribed by the corporate charter. Madison, etc., Co. *v.* Norwich, etc., Society, 24 Ind. 457; American, etc., Co. *v.* Minneapolis, St. Paul, etc., Co., 44 Minn. 93, s. c. 46 N. W. R. 143; Goff *v.* Toledo, etc., Co., 28 Ill. App. 529; Illinois, etc., Co. *v.* Jonte, 13 Ill. App. 424; Meyer *v.* Harnden, etc., Co., 24 How. Pr. 290; Hull *v.* East Line, etc., Co., 66 Texas 619, s. c. 2 S. W. R. 831; Harrison *v.*

it is held liable for the frauds, the misrepresentations,[1] and even the torts,[2] of its authorized agents, committed in the course of their employment.[3] In an action of trespass against a railroad company and its president, who was also the manager of a construction company, which had contracted with the railroad company to construct its road, it appeared that as such manager of the construction company, he made a contract with contractors to build a certain portion on a line, "as shown by a map designating the surveys, both on file in the office of the chief engineer" of the railroad, with such variations as should be determined on by the construction company; that as such he notified the contractors to commence the work "as per contract," and that they underlet four sec-

Kansas City, etc., Co., 50 Mo. App. 332; Lake Shore etc., Co. *v.* Foster, 104 Ind. 293, s. c. 4 N. E. R. 20, 54 Am. R. 319; Brooke *v.* New York, etc., Co., 108 Pa. St. 529; Winchell *v.* National, etc., Co., 64 Vt. 15, s. c. 23 Atl. R. 728.

[1] Bank of U. S. *v.* Davis, 2 Hill (N. Y.) 451; New York, etc., R. Co. *v.* Schuyler, 34 N. Y. 30.

[2] Drake *v.* Kiely, 93 Pa. St. 492; Moore *v.* Fitchburg R. Corp., 4 Gray (Mass.) 465; Whiteman *v.* Wilmington, etc., R. Co., 2 Harr. (Del.) 514; Evansville, etc., R. Co. *v.* McKee, 99 Ind. 519, where the company's detective caused the arrest of an innocent person, and the company was held liable in damages. Ranger *v.* Great Western, etc., Co., 5 H. L. Cases 72; Nolton *v.* Western R. Co., 15 N. Y. 444; Miller *v.* Burlington, 8 Neb. 219; Brokaw *v.* New Jersey, etc., Co., 32 N. J. L. 328; Gillemater *v.* Madison, etc., Co., 5 Ind. 339; State *v.* Morris, etc., Co., 23 N. J. L. 360; Quinn *v.* South Carolina, etc., Co., 29 So. Car. 381, s. c. 7 S. E. R. 614, 1 L. R. A. 682; Cohen *v.* Dry Dock, etc., 69 N. Y. 170; Pittsburgh, etc., Co. *v.* Kirk, 102 Ind. 399, s. c. 52 Am. R. 675; Hussey *v.* Norfolk, etc., Co., 98 N. C. 34, s. c. 2 Am. St. R. 312; Payne *v.* Western, etc., Co., 13 Lea (Tenn.) 507, s. c. 49 Am. R. 666; Craker *v.* Chicago, etc., Co., 36 Wis. 657, s. c. 17 Am. R. 504; Smith *v.* Manhattan, etc., Co., 45 N. Y. S. R. 865; Stewart *v.* Brooklyn, etc., Co., 90 N. Y. 588, s. c. 43 Am. R. 185; Northwestern, etc., Co. *v.* Hack, 66 Ill. 238; Ramsden *v.* Boston, etc., Co., 104 Mass. 117.

[3] The old common law doctrine that a master is not liable for the willful act of the servant, although performed within the line of duty, has been overthrown. Craker *v.* Chicago, etc., Co., 36 Wis. 657, s. c. 17 Am. R. 504; Perkins *v.* Missouri, etc., Co., 55 Mo. 201; Heenrich *v.* Pullman, etc., Co., 20 Fed. R. 100; De Camp *v.* Mississippi, etc., 12 Iowa 348; Toledo, etc., R. Co. *v.* Harmon, 47 Ill. 298; Indianapolis, etc., Co. *v.* Anthony, 43 Ind. 183; Terre Haute, etc., Co. *v.* Jackson, 81 Ind. 19, s. c. 6 Am. & Eng. R. R. Cases 178, Quigley *v.* Central, etc., Co., 11 Nev. 350; Ritchie *v.* Waller, 27 L. R. A. 161, and notes; Pennsylvania Co. *v.* Weddle, 100 Ind. 138, and cases cited.

tions to a contractor, who committed the trespass; the president also wrote the body of a letter purporting to be signed by the construction company to the contractors, stating that it was deemed advisable by the executive committee of the railroad (of which committee he was a member) to change the line of survey at that place, and requesting them to await instructions, and suspend operations; the contractors stopped work, but were paid for the work on plaintiff's land, on estimates approved by the chief engineer in drafts approved by the executive committee, and it was held, that the testimony of a director of the railroad company that there was a contract with the construction company, together with the fact that the latter company was working under the railroad company's franchise, and with its consent, was enough to show a liability on the part of the railroad company for whatever the sub-contractors did *bona fide* and in the line of their employment.[1] The corporation is also liable for the negligence of its agents or servants resulting in the failure to perform duties imposed upon it for consequent injury to one to whom such duties are owing,[2] even though the servants were carefully selected with reference to their competency.[3] The employer's duty is not fully discharged when he exercises care in the selection of employes, although it is his duty to exercise such care[4] but he is liable for not seeing to it that his employes perform

[1] St. Louis, etc., R. Co. *v.* Drennan, 26 Ill. App. 263. A corporation can not, by its by-laws, or any constating instrument, avoid liability for the wrongful acts of its officers or servants performed within the scope of their authority. Sherman *v.* Commercial Printing Co., 29 Mo. App. 31.

[2] Brown *v.* Chicago, etc., R. Co., 54 Wis. 342; Pennsylvania Co. *v.* Hoagland, 78 Ind. 203; Byrne *v.* Wilson, 15 Irish. C. L. 332. This is true, although the passenger traveled free, under a contract whereby he assumed all risks of accidents. Ohio, etc., R. Co. *v.* Selby, 47 Ind. 471; Johnson *v.* Missouri Pacific, etc., Co., 96 Mo. 340.

[3] Gillenwater *v.* Madison, etc., R. Co., 5 Ind. 339. See, generally, McClung *v.* Dearborne, 134 Pa. St. 396, s. c. 19 Am. St. R. 708; Golden *v.* Newbrand, 52 Iowa 59, s. c. 35 Am. R. 257; New Orleans, etc., Co. *v.* Harrison, 48 Miss. 112, s. c. 12 Am. R. 356; Baird *v.* Shipman, 132 Ill. 16, s. c. 22 Am. St. R. 514; Blake *v.* Ferris, 5 N. Y. (1 Selden) 48, s. c. 55 Am. Dec. 304; Georgia, etc., R. Co. *v.* Dougherty, 86 Ga. 744.

[4] Western Stone Co. *v.* Whalen, 151 Ill. 472, s. c. 42 Am. St. R. 244; Hilts *v.* Chicago, etc., Co., 55 Mich. 437; Gilman *v.* Eastern, etc., Co., 10 Allen 233, s. c. 87 Am. Dec. 635; Gilman *v.* Eastern, etc., Co., 13 Allen 433, s. c.

their duties with reasonable care, skill and diligence. As already suggested, the employer is not exonerated, although the negligence consisted in disobeying orders.[1]

§ 214. **Authority of agent—Line of duty.**—The principal is liable only for acts done within the scope of the agent's authority, express or implied.[2] Beyond the scope of authority

90 Am. Dec. 210; Monahan *v.* Worcester, 150 Mass. 439, s. c. 15 Am. St. R. 226; Grube *v.* Missouri, etc., Co., 98 Mo. 330, s. c. 14 Am. St. R. 645; Lee *v.* Michigan Central, etc., Co., 87 Mich. 574; Lake Shore, etc., Co. *v.* Stupak, 123 Ind. 210; Hatt *v.* Nay, 144 Mass. 186; Davis *v.* Detroit, etc., Co., 20 Mich. 105, s. c. 4 Am. R. 364; Chicago, etc., Co. *v.* Shannon, 43 Ill. 338; Toledo, etc., Co. *v.* Bailey, 145 Ill. 159; Wabash, etc., Co. *v.* McDaniels, 107 U. S. 454; Union, etc., Co. *v.* Young, 19 Kans. 488; Wright *v.* New York, etc., Co., 25 N. Y. 562.

[1] Philadelphia, etc., R. Co. *v.* Derby, 14 How. (U. S.) 468. A person seeking to charge a corporation with the act of its officers or authorized agents is not affected by secret instructions limiting the apparent powers of such officers or agents. Benesch *v.* John Hancock Mut. L. Ins. Co. (C. P.), 32 N. Y. S. R. 73.

[2] The general subject was well considered in the case of Chicago, etc., Co. *v.* Bryant, 65 Fed. R. 969, 974. The reporter in his head notes makes this statement of the case: "A yardmaster, after 6 P. M., on being relieved from duty, took a passenger car and engine to give himself and fellow-servants a free ride to and from a meeting of theirs, without notice or permission from any officer who had authority to permit the passage of such a train. Held that such act, not having been done in the course of his employment, but for his own ends exclusively, and without authority to carry passengers for the company, and having no apparent authority, except possession of the train, the company was not liable as to a passenger for injury to one on the train." In the course of the opinion the court used this language: "Moreover, it is a fatal objection to the liability of this company for the acts of this yardmaster in operating this train that they were not in the course of his employment for the company, but for his own ends exclusively, while he was at liberty from his master's service. The master is not liable for an act done by a servant when he is free from his service, and is not attempting to discharge any duty to his master imposed upon him by his employment, but is pursuing his own ends exclusively, even though the act could not have been done without the facilities afforded by his relation to his master." In Mitchell *v.* Crassweller, 13 C. B. 237, a carman, whose duty it was to put the horse and cart of his master in his stable after the day's work was completed, obtained the keys of the stable for that purpose, and then drove in another direction on his own business, without the consent of his master. On his return he drove his master's horse and cart against and injured a third person, but the master was held to be exempt from liability for this injury. In Cousins *v.* Hannibal, etc., Railroad Co., 66 Mo. 572, the superintendent of the company

or duty he is a stranger to his principal and can not bind him. Very many cases hold that the master is not liable for a servant's willful and malicious trespass which he has neither commanded nor ratified and which was evidently perpetrated to gratify the private hate or malignity of the servant, although done under color of a discharge of the duty which he has undertaken for his employer.[1] Thus it is held that where a person who applies to have his baggage checked, and by his abusive language provokes a quarrel with the baggageman, in the course of which the baggageman injures him with a hatchet, he can not hold the railroad company liable for his injuries.[2] The principle is one of wide sweep and is illustrated

took an idle locomotive from its roundhouse in the night, and ran it two and one-half miles for a doctor for a sick neighbor. On the way he carelessly drove the engine upon and killed the plaintiff's mule. But the supreme court of Missouri held that the company was not liable for the death of the mule. In Morier *v.* St. Paul, etc., Railway Co., 31 Minn.351-353,17 N.W. R. 952, a case in which an action was brought against the company for damages that resulted from a fire kindled by its sectionmen on its right of way to cook their dinners on a day when they were working for the company, before and after their dinner, Judge Mitchell, of the supreme court of the state of Minnesota, states this rule in these words: "If the act be done while the servant is at liberty from the service, and pursuing his own ends exclusively, the master is not responsible. If the servant was, at the time when the injury was inflicted, acting for himself, and as his own master, *pro tempore*, the master is not liable. If the servant step aside from his master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended. Such, variously expressed, is the uniform doctrine laid down by all authorities. 2 Thomp. Neg. 885, 886; Shear. & R. Neg., §§ 62, 63; Cooley Torts, 533, *et seq.*; Little Miami Railroad Co. *v.* Wetmore, 19 Ohio St. 110; Storey *v.* Ashton, L. R. 4 Q. B. 476; Mitchell *v.* Crassweller, 13 C. B. 237; McClenaghan *v.* Brock, 5 Rich. Law 17." To the same effect are Campbell *v.* City of Providence, 9 R. I. 262, and Garretzen *v.* Duenckel, 50 Mo. 104, 107, 111.

[1] McManus *v.* Crickett, 1 East. 106; Evansville, etc., R. Co. *v.* Baum, 26 Ind. 70; Hibbard *v.* New York, etc., R. Co., 15 N. Y. 455; Illinois Central R. Co. *v.* Downey, 18 Ill. 259. Where one agrees to supply a railroad company with timber for construction of its road, and employes of subcontractors under him committed trespasses in getting timbers for such construction, the railroad company is not liable under the statute providing that an employer is not liable for torts of his employes, engaged in an independent business, when there is no evidence of a ratification by the company. Parker *v.* Waycross & F. R. Co., 81 Ga. 387, s. c. 8 S. E. R. 871.

[2] Little Miami R. Co. *v.* Wetmore, 19 Ohio St. 110. The weight of authority holds the employer liable for willful injuries.

by many cases presenting divers phases.[1] It is held that an agent employed to control and supervise the lands of a railway corporation can not render the company liable in damages for malicious prosecution by instituting a criminal prosecution for larceny of the company's property, even though the prosecution is shown to be malicious and without probable cause.[2] So where a railroad inspector imprisoned the plaintiff on a charge of drunkenness and refusal to pay his fare, and preferred a charge against him before a magistrate by whom he was dismissed, the court held that the company was not liable in the absence of anything going to show that the inspector was authorized to make the arrest or that the fact of the plaintiff being in custody was known to the

[1] Walker *v.* Hannibal, etc., Co., 121 Mo. 575, s. c. 42 Am. St. R. 547; Garretzen *v.* Duenckel, 50 Mo. 104, s. c. 11 Am. R. 405; Cousins *v.* Hannibal, etc., Co., 66 Mo. 572; Mitchell *v.* Crassweller, 13 Com. B. 237; Farber *v.* Missouri, etc., Co. 116 Mo. 81; Towanda, etc., Co. *v.* Heeman, 86 Pa. St. 418; McKenzie *v.* McLeod, 10 Bing. 385; Farber *v.* Missouri Pacific Co., 32 Mo. App. 378; McKeon *v.* Citizens', etc., Co., 42 Mo. 79; Walton *v.* New York, etc., Co., 139 Mass. 556; Cunningham *v.* Grand Trunk Railroad, 31 U. C. Q. B. 350; Stephenson *v.* Southern, etc., Co., 93 Cal. 558, s. c. 27 Am. St. R. 226; Pittsburgh, etc., Co. *v.* Shields, 47 Ohio St. 387, s. c. 21 Am. St. R. 840. In many cases the question whether the act was performed within the scope of the agent's authority is one of fact. Kimball *v.* Cushman, 103 Mass. 194, s. c. 4 Am. R. 528; Redding *v.* South Carolina, etc., Co., 3 S. C. 1, s. c. 16 Am. R. 681; Ritchie *v.* Waller, 63 Conn. 155, s. c. 38 Am. St. R. 361. But the question is often one of law. Stone *v.* Hills, 45 Conn. 44, s. c. 29 Am. R. 635; Storey *v.* Ashton, L. R. 4 Q. B. 476. See, generally, Rounds *v.* Delaware, etc., Co., 64 N. Y. 129, s. c. 21 Am. R. 597; Cormack *v.* Digby, 9 I. R. C. L. 557; Burns *v.* Poulson, L. R., 8 Com. P. 563; Sleath *v.* Wilson, 9 Car. & P. 607; Whatman *v.* Pearson, L. R. 3 Com. P. 422; Pollock says, "whether the servant is really bent on his master's affairs or not is a question of fact, but a question which may be troublesome." Pollock on Torts, marginal page 71. This statement of the law is not entirely correct, for there are cases in which the court must determine, as matter of law, whether the agent was acting within the scope of his authority.

[2] Pressley *v.* Mobile, etc., R. Co., 15 Fed. R. 199. But if it was part of the duty of a ticket agent of a corporation to post in his office notices pertaining to the business carried on there, the corporation is liable for a libel contained in a notice posted by him, though in excess of his authority. Fogg *v.* Boston, etc., R. Co., 148 Mass. 513. And the railroad company is liable for a malicious prosecution instituted by the general manager, although its charter did not authorize his act. Gulf, etc., R. Co. *v.* James, 73 Tex. 12, 10 S. W. 744.

company.[1] If, however, the act is within the scope of the agent's duty, and is performed in the line of service, the weight of authority is that the master is liable, although the act is willful.

§ 215. **Scope of authority—General conclusion.**—The conflict among the authorities to which we have referred makes it, we know, hazardous to venture to state a general conclusion, but we think that it is safe to affirm that, where cars or other equipments or appliances are owned and used for particular purposes and this is matter of general knowledge, no agent or servant of a railway company has authority to impose a duty upon the company by inviting a third person to use such equipments or appliances for his own pleasure or convenience, such person not being in the service of the company, having no business relations with it, and there being no emergency warranting a departure from the ordinary course of conduct or business. We have, indeed, stated our general conclusion in narrower terms than the best reasoned cases warrant, and are inclined to think the conclusion should be stated in broader terms. In our opinion, no agent or servant of a railroad com-

[1] Eastern Counties R. Co. *v.* Broom, 15 Jur. 297, 2 Eng. L. & Eq. 406. But where the agent is employed to detect and arrest persons who unlawfully interfere with its business, and while acting within the scope of his employment, he arrests an innocent person, the corporation is liable. Evansville, etc., R. Co. *v.* McKee, 99 Ind. 519; Galveston, etc., R. Co. *v.* Donahoe, 56 Tex. 162; Lynch *v.* Metropolitan, etc., R. Co., 90 N. Y. 77; Pennsylvania Co. *v.* Weddle, 100 Ind. 138; Higgins *v.* Watervliet, etc., R. Co., 46 N. Y. 23, s. c. 7 Am. R. 293; Louisville, etc., Co. *v.* McKee, 92 Ind. 371, s. c. 47 Am. R. 193; Pierce on Railroads 277; 2 Rorer on Railroads, 821. See Goff *v.* Great Northern R. Co., 30 L. J. Q. B. 148, holding a railroad company liable for an arrest made by one of its servants under an authority to make arrests in certain cases, conferred upon railway employes by statute. There is, however, a conflict of authority. The supreme court of Maryland, in the case of The Central R. Co. *v.* Brewer, (Md.)28 Atl. R. 615, held that a street railway company is not liable for a malicious prosecution and false arrest of an individual by its president and superintendent on a charge of having passed counterfeit money, unless such officers have express authority for such action or it is ratified by the company, citing Carter *v.* Machine Co., 51 Md. 290; Tolchester Co. *v.* Steimmier, 72 Md. 313. The conflicting cases are collected in a note to Ritchie *v.* Waller, 60 Conn. 155, s. c. 27 L. R. A. 161.

pany has general authority to devote any of the property of the company to uses entirely different and foreign from that to which the property was devoted by the corporation. The most liberal view that can be justly taken in favor of one who acts upon an invitation given by an agent or servant of the company to use its property for a purpose essentially different from that to which the property is devoted by the company is that he is a bare licensee to whom the company owes no duty except that of doing him no willful injury. There is, in truth, strong reason for regarding such a person as a mere trespasser. The cases which hold that one who undertakes to render service for a railroad company upon the request of an agent or employe who has no authority to bind the company by such a request is a mere volunteer to whom the company is responsible for willful wrongs, but not for injuries resulting from negligence, support the conclusion stated.[1]

§ 216. Contracts by agents—General doctrine.—The general rules applicable to contracts by agents of corporations apply to contracts by agents of railroad companies, varied only by the peculiar facts or by the nature of the business to which the

[1] We cite a few of the many cases which by their direct judgments or by their reasoning sustain our conclusion. Ream *v.* Pittsburg, etc., R. Co., 49 Ind. 93; Chicago, etc., R. Co. *v.* Bryant, 65 Fed. R. 969; Mitchell *v.* Crassweller, 13 C. B. 237; Cousins *v.* Railroad Co., 66 Mo. 572; Morier *v.* Railway Co., 31 Minn. 351, 353, s. c. 17 N. W. R. 952; Campbell *v.* City of Providence, 9 R. I. 262; McClenaghan *v.* Brock, 5 Rich. Law 17; Wyllie *v.* Palmer, 137 N. Y. 248, 33 N. E. R. 381; Arasmith *v.* Temple, 11 Ill. App. 39; Flower *v.* Pennsylvania Co., 69 Pa. St. 210; Walton *v.* New York, etc., Co., 139 Mass. 556, s. c. 2 N. E. R. 101; Gulf, etc., Co. *v.* Dawkins, 77 Texas 228, s. c. 13 S. W. R. 932; Texas, etc., R. Co. *v.* Skinner, 4 Tex. Civ. App. 661, s. c. 23 S. W. R. 1001; Murray *v.* Currie, L. R. 6 C. P. 24; Louisville, etc., Co. *v.* Douglass, 69 Miss. 723; Everhart *v.* Terre Haute, etc., Co., 78 Ind. 292; Mayton *v.* Texas, etc., Co., 63 Texas 77, s. c. 51 Am. R. 637; Osborne *v.* Knox, etc., R. Co., 68 Me. 49, s. c. 28 Am. R. 16; Pittsburgh, etc., *v.* Adams, 105 Ind. 151; Mellor *v.* Merchants', etc., Co., 150 Mass. 362; Baird *v.* Petit, 70 Pa. St. 477; Washburn *v.* Nashville, etc., R. Co., 3 Head (Tenn.) 638; Gilshannon *v.* Storybrook, etc., Co., 10 Cush. 228; Wright *v.* Rawson, 52 Iowa 329; Keating *v.* Michigan, etc., Co., 97 Mich. 154, s. c. 56 N. W. R. 346.

contracts relate. It is not our purpose to consider the subject of agency generally, but to treat it only so far as is necessary to the unity and completeness of the plan of our work. It may be said at the outset that an agent may bind the corporation by any contract which he may make within the scope of his apparent authority, although he exceeds his real authority, unless the party with whom he is dealing knows the contract to be one which he is not authorized to make, but he can not bind the company by an act outside of the real or apparent scope of his authority.[1] It has been held that a railroad company can neither be bound by a contract made by a person who is not its agent, nor can it ordinarily enforce a contract made by a person who is not its agent.[2] We suppose, however, that the doctrine of the cases cited in the note must be qualified by the rule that an effective ratification is equivalent to precedent authority. Strictly speaking, the relation of principal and agent can not exist in the absence of a contract, express or

[1] Harrison *v.* Missouri Pacific R. Co., 74 Mo. 364. Where the brakeman took up the tickets for the conductor, and returned the wrong part of a return ticket to a passenger, thinking, as he testified that "one-half of the ticket was good for a ride either way" the railroad was bound to accept such part of the ticket in payment for the return passage, and was held liable in damages for a refusal so to do. Lake Erie, etc., R. Co. Fix, 88 Ind. 381. Persons held out as the general agent and the state agent of a foreign corporation, who employ a general manager to assist them in its work, bind the corporation by their contract, if the other party is ignorant of the limitation on their authority. Equitable Endowment Assn. *v.* Fisher, 71 Md. 430. But an officer of a corporation not authorized to transact the general business of the company with third persons can not bind the company by certifying that the company has no lien on certain shares of stock. Kenton Ins. Co. *v.* Bowman, 84 Ky. 430. Katzenstein *v.* Raleigh, etc., R. Co., 84 N. C. 688, s. c. 6 Am. & Eng. R. R. Cases 464; Montgomery, etc., Co. *v.* Hurst, 9 Ala. 513; Chicago, etc., Co. *v.* Volk, 45 Ill. 175; Wood *v.* Ontario, etc., Co., 24 Up. Can. C. P. 334; Dye *v.* Virginia, etc., Co., 9 Mackey 63; Deming *v.* Grand Trunk, etc., Co., 48 N. H. 455; Fowlds *v.* Evans, 52 Minn. 551, s. c. 54 N. W. R. 743; International, etc., Co. *v.* Ragsdale, 67 Texas 24, s. c. 2 S. W. R. 515; Beattie *v.* Delaware, etc., Co., 90 N. Y. 643; St. Louis, etc., Co. *v.* Hendricks, 48 Ark. 177, s. c. 2 S. W. R. 783; Neibles *v.* Minneapolis, etc., Co., 37 Minn. 151, s. c. 33 N. W. R. 332; Montgomery, etc., Co. *v.* Hardaway, (Ala.) 16 So. R. 29; London & Northwestern R. Co. *v.* Bartlett, 7 H. & N. 400; Foster *v.* Cleveland, etc., Co., 56 Fed. R. 434.

[2] Chicago, etc., Co. *v.* Estes, 71 Iowa 603, s. c. 33 N. W. R. 124, 30 Am. & Eng. R. R. Cases 276; Estes *v.* Chicago, etc., Co., 72 Iowa 235.

implied.[1] This doctrine sustains the decisions which adjudge that a volunteer can not be regarded as the agent or employe of a railroad company, although he may, in fact, assume to perform acts in its service.

§ 217. Declarations and admission of agents.—The familiar rule is that a principal is not bound by the declarations or admissions of an agent unless made in the course of business or line of duty of the agent and while "the transaction is depending." This rule is one of extensive application. An agent may bind the corporation by his declarations and admissions made in and about the execution of the duties of his employment in the same manner that an agent of a private individual may bind his principal.[2] It is, however, essential to the competency of such declarations that they be not narratives of past occurrences, but part of the *res gestæ*.[3]

§ 218. Declarations of agent—Res gestæ.—The settled rule is that the declarations of an agent made after the transaction is closed, or after an event has happened, are not admissible against the principal.[4] The authorities are substantially agreed

[1] Central Trust Co. *v.* Bridges, 57 Fed. R. 753, s. c. 57 Am. & Eng. R. R. Cases 452; Fischer *v.* Merchants' Despatch, etc., Co., 13 Mo. App. 133; Kelly *v.* Lehigh, etc., Co., 8 Daly (N. Y.) 291. In the case first cited the court said: "An agency is created—authority is actually conferred, very much as a contract is made, *i. e.*, by an agreement between the principal and agent that such a relation shall exist. The minds of the parties must meet in establishing the agency." This rule does not apply where the principal holds out another as his agent, for in such a case the liability rests upon the ground of estoppel.

[2] Whitworth *v.* Detroit, etc., R. Co., 81 Mich. 98; Malecek *v.* Tower Grove R. Co., 57 Mo. 17; Covington R. Co. *v.* Ingles, 15 B. Mon. (Ky.) 637; Henderson *v.* Railroad Co., 17 Tex. 560; Montgomery R. Co. *v.* Hurst, 9 Ala. 513; Union, etc., Co. *v.* Hepner, 3 Colo. App. 313; International, etc., Co. *v.* Lewis, (Tex. Civil App.) 23 S. W. R. 323; Ohio, etc., Co. *v.* Stein, 133 Ind. 243; Louisville, etc., Co. *v.* Buck, 116 Ind. 566.

[3] To be admissible the declarations must be made by the agent acting within the scope of his authority, *dum fervet opus*. Bevis *v.* Baltimore, etc., Co., 26 Mo. App. 19; Bensley *v.* Brockway, 27 Ill. App. 410; Corrister *v.* Kansas City, etc., Co., 25 Mo. App. 619; Southerland *v.* Wilmington, etc., Co., 106 N. C. 100, s. c. 11 S. E. R. 189; Deere *v.* Bagley, 80 Iowa 197, s. c. 45 N. W. R. 557.

[4] Borland *v.* Nevada Bank, 99 Cal. 89, s. c. 33 Pac. R. 737; Holt *v.* Spok-

that the declarations are not competent unless made under such circumstances and at such a time and place as to be regarded as part of the *res gestæ*;[1] but there is much diversity of opinion as to what declarations can be considered as part of the *res gestæ*. Some of the cases have unduly extended the rule and allowed prejudicial declarations to go to the jury[2] unmindful of the sound principle that declarations of a third person are generally incompetent and that the declarations of an agent are held competent as exceptions to the general rule. Other cases have erred, as we think, in allowing expressions of opinion to go in evidence as part of the *res gestæ*.[3] It

ane, etc., Co., (Idaho) 35 Pac. R. 39; Wendt *v.* Chicago, etc., Co., (S. Dak.) 57 N. W. R. 226; Bellefontaine, etc., Co. *v.* Hunter, 33 33 Ind. 335; St. Louis, etc., Co. *v.* McLelland, 62 Fed. R. 116; McCarthy *v.* Muir, 50 Ill. App. 510; Ft. Smith Oil Co. v. Slover, 58 Ark. 168, s. c. 24 S. W. R. 106; Weideman *v.* Tacoma, etc., Co., 7 Wash. 517, s. c. 35 Pac. R. 414; Chewning *v.* Ensly, etc., R. Co., 100 Ala. 493, s. c. 14 So. R. 204; Huntsville, etc., Co. *v.* Corpening, 97 Ala. 681, s. c. 12 So. R. 295; La Rue *v.* St. Anthony, etc., Co., 3 S. Dak. 637, s. c. 54 N. W. R. 806; Johnson *v.* East Tennessee, etc., Co., 90 Ga. 810, s. c. 17 S. E. R. 121; Ohio, etc., Co. *v.* Levy, 134 Ind. 343, s. c. 32 N. E. 815; Atchison, etc., Co. *v.* Parker, 55 Fed. R. 595; Grisim *v.* Milwaukee, etc., Co., 84 Wis. 19, s. c. 54 N. W. R. 104; Chicago, etc., Co. *v.* Johnson, 36 Ill. App. 564; Petrie *v.* Columbia, etc., Co., 27 S. C. 63, 2 S. E. R. 837; Waldrop *v.* Greenwood, etc., Co., 28 S. C. 157, s. c. 5 S. E. R. 471; St. Louis, etc., R. Co. *v.* Kelley, (Ark.) 31 S. W. R. 884.

[1] State *v.* Tilly, 3 Ired. (N. C.) Law 424; Vickburg, etc., Co. *v.* O'Brien, 119 U. S. 99; Durkee *v.* Central Pacific, etc., Co., 69 Cal. 533; State *v.* Pomeroy, 25 Kan. 349; Michigan, etc., Co. *v.* Coleman, 28 Mich. 440, 446; Southerland *v.* Wilmington, etc., Co., 106 N. C. 100; Martin *v.* New York, etc., Co., 103 N. Y. 626; Waldele *v.* New York, etc., R. Co., 95 N. Y. 274, Luby *v.* Hudson River, etc., Co., 17 N. Y. 131; Chicago, etc., Co. *v.* Becker, 32 Fed. R. 849; Cincinnati, etc., Co. *v.* Mara, 26 Ohio St. 185; Adams *v.* Hannibal, etc., Co., 74 Mo. 553; Memphis, etc., Co. *v.* Womack, 84 Ala. 149; Pittsburgh, etc., Co. *v.* Theobald, 51 Ind. 246; Ohio, etc., Co. *v.* Stein, 133 Ind. 243.

[2] Omaha, etc., Co. *v.* Chollette, 41 Neb. 578, s. c. 59 N. W. R. 921; Linderberg *v.* Crescent Co., 9 Utah 163, s. c. 33 Pac. 692; International, etc., Co. *v.* Smith, (Texas) 44 Am. & Eng. R. Cases 324, s. c. 14 S. W. R. 642; Gulf, etc., Co. *v.* Compton, 75 Texas 667, s. c. 13 S. W. R. 667; Hooker *v.* Chicago, etc., Co., 76 Wis. 542, s. c. 44 N. W. R. 1085, 41 Am. & Eng. R. Cases 498; Texas, etc., Co. *v.* Lester, 75 Texas 56, s. c. 12 S. W. R. 955; Gorman *v.* Minneapolis, etc., Co., 78 Iowa 509, s. c. 43 N. W. R. 303.

[3] Elledge *v.* National, etc., Co., 100 Cal. 282, s. c. 34 Pac. R. 720. See Metropolitan, etc., Co. *v.* Collins, 1 App. D. C. 383; St. Louis, etc., Co. *v.* Paup, (Ark.) s. c. 22 S. W. R. 213; Alabama, etc., Co. *v.* Hill, 90 Ala. 71, s. c. 9 L. R. A. 442, 8 So. R. 90.

seems to us that an opinion of a witness can not be regarded as part of an occurrence or transaction, and that only the facts connected with the occurrence can be strictly said to form part of the *res gestæ*.

§ 219. **Declarations must relate to transaction or event in controversy.** — Declarations of an agent not relating to the transaction or occurrence are not admissible against the principal, nor are declarations not connected with matters over which the agent has authority.[1] It has been held that declarations of an agent, although made at the time of the occurrence, are not competent against the principal because not connected with it.[2] It is important that the rule admitting declarations of agents be confined within its legitimate limits, as its extension is likely to result in unjust injury.

[1] Baltimore, etc., Co. *v.* Christie, 5 W. Va. 325; Missouri, etc., Co. *v.* Stults, 31 Kan. 752, s. c. 15 Am. & Eng. R. Cas. 97, 3 Pac. R. 522; Chillicothe *v.* Raynard, 80 Mo. 185; Wells *v.* Alabama, etc., Co., 67 Miss. 24, s. c. 6 So. R. 737; Kirby *v.* Great Western, etc., Co., 18 L. T. N. S. 658.

[2] Butler *v.* Manhattan R. Co., 143 N. Y. 417, s. c. 42 Am. St. R. 738. We quote from the opinion the following: "We think there was error also in one of the rulings upon the admission of evidence. The plaintiff's wife testified to the closing of the gate and the blow received, and stated that at the time the guard was looking in the opposite direction; that immediately after the blow she made an exclamation of pain. Then plaintiff's counsel then asked the witness 'What the guard said in reply to her exclamation of pain.' The question was objected to by the counsel for the defendant as incompetent and hearsay, whereupon the plaintiff's counsel said: 'I intend to prove that the brakeman in charge of the brakes at the moment of the blow did not treat her (the plaintiff's wife) with respect, but, on the contrary, insulted her.' The trial judge, after warning the plaintiff's counsel, finally allowed the question to be put, and the witness answered. He said: 'I can go to hell; shut up.' The defendant's counsel excepted to the evidence. The only claim made in support of the ruling of the court is that the remark of the brakeman was part of the *res gestæ*. We think the ruling can not be supported upon this ground. The only circumstance upon which it can be claimed to have been part of the *res gestæ* was its connection in point of time with the transaction under investigation, viz.: The alleged injury from the closing of the gate. While proximity in point of time with the act causing the injury is, in every case of this kind, essential to make what was said by a third person competent evidence against another as part of the *res gestæ*, that alone is insufficient, unless what was said may be considered part of the principal fact, and so a part of the act itself. But,

§ 220. **Exercise of authority by agents — Illustrative cases.** —As a general rule the authority of an agent extends to the doing of all subordinate acts which properly accompany the principal act which he is to do. Thus, a power given by a corporation to an agent to purchase property for the corporation necessarily carries with it the power to obligate the company to pay, notwithstanding the fact that a by-law forbids the contracting of any debt for a company except by order of the directors.[1] If he has never been clothed with any real or apparent authority by the corporation, the person who deals with him relying upon his representations as to his authority has no recourse on any one but the person who assumes to be the agent of the corporation.[2] And where the acts done are outside of the ordinary duties of similar agents in corporations generally, the presumption will be that they were done without authority.[3] Accordingly, it is held that without a special authority conferred upon him in the particular instance, neither an assistant road-master nor a master of transportation can be pre-

as in this case, the act was complete before the remark of the brakeman was made, although closely connected with it in point of time, and was not one naturally accompanying the act, or calculated to unfold its character or quality, it was not admissible as *res gestæ*. It was as independent of the principal fact, and as incompetent as evidence, as though the act and the remark had been much further separated in point of time. *Res gestæ* in a case like this implies substantial coincidence in time, but if declarations of third persons are not in their nature a part of the fact, they are not admissible in evidence, however closely related in point of time. See Waldele *v.* New York, etc., R. R. Co., 95 N. Y. 274; 47 Am. R. 41, and cases cited. The remark of the brakeman was brutal, and for that reason was calculated to prejudice the jury, but it had nothing to do with the question at issue, viz., whether the plaintiff's wife sustained an injury through the defendant's negligence, and, having been admitted against the protests of the defendant's counsel, its admission was reversible error."

[1] Arapahoe Cattle & Land Co. *v.* Stevens, 13 Colo. 534, 28 Am & Eng. Corp. Cas. 12, 22 Pac. 823.

[2] Talladega Ins. Co. *v.* Peacock, 67 Ala. 253; Risley *v.* Indianapolis, etc., R. Co., 1 Hun (N. Y.) 202. Even in cases of negotiable instruments, those dealing with an agent must inquire into his authority. Silliman *v.* Fredricksburg, etc., R. Co., 27 Gratt. 119. An agency can not be proved by proof of the oral declarations of the supposed agent himself. Missouri Pacific R. Co. *v.* Stults, 31 Kan. 752.

[3] Louisville, etc., R. Co. *v.* McVay, 98 Ind. 391; Marquette, etc., R. Co. *v.* Taft, 28 Mich. 289.

sumed to have authority to represent a railroad company in claiming disputed titles.[1] And the track-master of a railroad company, having charge of a section of its road-bed, which includes an ash pit, has no authority to make a contract allowing one to have all the coals and ashes dumped by locomotives at the pit as compensation for keeping it clear.[2] The fact that a civil engineer of a railroad, who had no special authority to employ men, told a man to see to delivering some freight which was on the steps of the freight house, and to look to things there, and remain until the company discharged him, creates no right of action against the company; and such an employment does not become binding upon the company by being ratified by the station agent who is not shown to have had authority in the matter.[3]

§ 221. **Scope of authority—Illustrative cases.**—A person climbed upon a railroad train on which he was forbidden by the rules of the company to ride, and was compelled by an employe of the company who had no authority over the train, to alight while it was in motion, and was thereby injured. The company was held not liable.[4] It has been held that a locomotive engineer, being subordinate to the conductor in charge of the train, has no authority to impose a duty upon a railroad company to persons whom he permits to ride on the train in violation of the rules of the company.[5] A similar doctrine is held with reference to the authority of the baggage-master to permit persons to ride on a train,[6] and a like doctrine was ap-

[1] Drew *v.* Comstock, 57 Mich. 176, 23 N. W. R. 721.

[2] Little *v.* Kerr, 44 N. J. Eq. 263, 14 Atl. 613.

[3] Willis *v.* Toledo, etc., R. Co., 72 Mich. 160.

[4] Towanda Coal Co. *v.* Heeman, 86 Pa. St. 418; Marion *v.* Chicago, etc., R. Co., 59 Iowa 428. But if one with authority to put him off the train should do so in an improper manner and thereby cause him to be injured, the company would be liable. Carter *v.* Louisville, etc., R. Co., 98 Ind. 552; Rounds *v.* Delaware, etc., R. Co., 64 N. Y. 129; Benton *v.* Chicago, etc., R. Co., 55 Iowa 496.

[5] Chicago, etc., Co. *v.* Casey, 9 Ill. App. 632, citing Chicago, etc., Co. *v.* Mitchie, 83 Ill. 427.

[6] Reary *v.* Louisville, etc., Co., 40 La. Ann. 32, s. c. 8 Am. St. R. 497, 34 Am. & Eng. R. R. Cases 277, 3 So. R. 390.

plied in a case where a person was riding on the train by invitation of a brakeman.[1] A somewhat different doctrine was held in a case where a person was invited to get on an engine,[2] but the doctrine of the case referred to seems to us to be unsound. An employe has no authority to invite persons to ride on the hand-car for their own pleasure or convenience.[3] It has, however, been held that a train-master has authority to invite persons to ride on a hand-car,[4] but in our opinion this decision is erroneous, for a hand-car, as every one is bound to know, is not kept or used by a railroad company for carrying persons not in its service or having business with it. In a well considered case it was held that a section foreman had no authority to invite persons to ride on a hand-car,[5] and the doctrine asserted in that case we regard as the true one.

§ 222. **Authority of agents—Employment of surgeons.**—A number of cases have arisen in recent years presenting questions relating to the employment of physicians and surgeons, and

[1] Candiff *v.* Louisville, etc., Co., 42 La. Ann. 477, s. c. 7 So. R. 601.

[2] Nashville, etc., Co. *v.* Erwin, (Tenn.) 3 Am. & Eng. R. R. Cases 465. But see Ohio, etc., Co. *v.* Allender, 47 Ill. App. 484.

[3] International, etc., Co. *v.* Cock, 68 Texas 713, s. c. 5 S. W. R. 635. See Pool *v.* Chicago, etc., Co., 56 Wis 227, s. c. 14 N. W. R. 46.

[4] International, etc., Co. *v.* Prince, 77 Texas 560, s. c. 44 Am. & Eng. R. R. Cases 294, 14 S. W. R. 171. See Prince *v.* International, etc., Co., 64 Texas 144.

[5] Hoar *v.* Maine Central Co., 70 Me. 65, s. c. 35 Am. R. 299. The court cited the cases of Graham *v.* Toronto, etc., Co., 23 Up. Can. (C. P.) 541; Sheerman *v.* Toronto, etc., Co., 34 Up. Can. Q. B. 451, and in the course of the opinion said: "A master is bound by the acts of his servant in the course of his employment, but not by those obviously and utterly outside of the scope of such employment. If not common carriers a section foreman with his hand-car has no right to impose upon the defendant the onerous responsibilities arising from that relation. He has no right to accept passengers for transportation and bind the defendants for their safe carriage, and every man may safely be presumed to know this much. If the risk is much greater by this mode of conveyance, the plaintiff's intestate, by adopting it, assumed the extra risk, arising therefrom and must be held to abide the unfortunate consequences. No one becomes a passenger except by the consent, express or implied, of the carrier. There is no allegation of express consent by the defendants, nor of anything from which consent can be implied that the plaintiff's intestate should be carried at their risk by this unusual mode of conveyance."

the subject merits more than a general reference. It may be affirmed that the employment of a physician or surgeon is not ordinarily within the scope of the authority of a subordinate agent or employe, but that there may be extraordinary cases giving authority to employ a surgeon or physician. Neither a road-master,[1] section agent,[2] yard-master,[3] nor station-master,[4] will be presumed to have authority to employ a physician to attend a servant of the company injured in the line of his duties. So, also, it is held that there is nothing in the duties of the company's solicitor,[5] or surgeon,[6] or engineer,[7] or conduc-

[1] Louisville, etc., R. Co. *v.* McVay, 98 Ind. 391.

[2] Tucker *v.* St. Louis, etc., R. Co., 54 Mo. 177.

[3] Marquette, etc., R. Co. *v.* Taft, 28 Mich. 289.

[4] Cox *v.* Midland, etc., R. Co., 3 Exch. 268. A railroad company will be held to be legally liable to furnish necessary medical attendance and care to passengers injured by its fault, since it has contracted to carry them safely, and is liable for any failure to do so. But no such liability attaches when they are hurt by an inevitable accident, such as the derailment of a train by a cyclone. Union Pacific R. Co. *v.* Beatty, 35 Kans. 265. And a railroad company will be held liable for any necessary care bestowed upon an injured employe at the instance and request of the principal agent, which it may have upon the ground and in a position to engage such care, in an emergency calling for immediate action. Since an employer does not stand to his servants as a stranger, but owes them the duty imposed by the dictates of humanity. Terre Haute, etc., R. Co. *v.* McMurray, 98 Ind. 358; Terre Haute, etc., R. Co. *v.* Brown, 107 Ind. 336. But such authority by implication from necessity will not be extended any further than the necessities of the case require. Louisville, etc., R. Co. *v.* Smith, 121 Ind. 353.

[5] Neither a conductor nor a solicitor of a railroad company can ordinarily contract for surgical attendance upon an injured passenger or employe, so as to bind the company. St. Louis, A. & T. R. Co. *v.* Hoover, 53 Ark. 377.

[6] Mayberry *v.* Chicago, etc., R. Co., 75 Mo. 492; Terre Haute, etc., R. Co. *v.* Brown, 107 Ind. 336.

[7] In an action by a physician against a railroad company for professional services rendered to an employe of the company who had sustained an injury on its cars, it was *held* that evidence that the engineer of the train on which the injury happened, telegraphed to a station agent to have a doctor at the station when the train arrived, does not show an employment of the plaintiff by the company, in the absence of evidence of the authority of the engineer to bind the company. Cooper *v.* New York Central, etc., R. Co., 13 N. Y. Sup. Ct. R. 276. But it would seem that evidence that he was in sole charge of the train, and the employe's injuries required immediate attention would be sufficient to show his authority. Terre Haute, etc., R. Co. *v.* McMurray, 98 Ind. 358; Marquette, etc., R. Co. *v.* Taft, 28 Mich. 289, per Cooley, J. The doctrine of these cases last cited is to be

tor[1] from which such authority can be presumed. But an emergency calling for immediate action in order to save life or prevent suffering may be sufficient to confer authority upon the subordinate to employ necessary surgical aid, if he is the highest representative of the company on the ground.[2] There may be cases of immediate urgency when it will be within the scope of the agent's employment to render those imperative services which the dictates of justice and humanity hold to be due from an employer to a servant injured while engaged in his service;[3] and not only this, but in cases of urgent emergency it may become his duty to take such measures as will prevent

carefully limited and rigidly confined to cases where there is pressing and urgent emergency requiring immediate action. There is, of course, no general duty resting on the employer to care for sick or wounded employes, and the duty to obtain the services of a surgeon is not a general one, but a transient one arising out of and only existing during an emergency. An agent can not do more than the immediate urgency requires without exceeding his authority.

[1] St. Louis, etc., R. Co. *v.* Hoover, 53 Ark. 377; Tucker *v.* St. Louis, etc., R. Co., 54 Mo. 177; Terre Haute, etc., R. Co. *v.* McMurray, 98 Ind. 358. See, Northern Central R. Co. *v.* State, 29 Md. 420.

[2] Terre Haute, etc., R. Co. *v.* McMurray, 98 Ind. 358.

[3] Terre Haute, etc., R. Co. *v.* McMurray, 98 Ind. 358. In Marquette, etc., R. Co. *v.* Taft, 28 Mich. 289, Judge Cooley says, "We shall not stop to prove that there is a strong moral obligation resting upon any one engaged in a dangerous business, to do what may be immediately necessary to save life or prevent an injury becoming irreparable, when an accident happens to a person in his employ. We shall assume this to be too obvious to require argument * * * There can be no doubt that it is within the scope of somebody's employment for a railway company to cause a beast which is injured in carriage or run over at a crossing to be picked up and have the attention proper and suitable to its case; and if no one is authorized to do as much for the faithful servant of the company who is in like manner injured, but all persons in its employ are impliedly forbidden to incur any expense beyond what may be necessary to remove him out of the way of their trains and machinery—even to convey him to his house, or to save his life by binding up a threatening wound—then, if such is the law, the courts must not hesitate to apply it, even though it be impossible to avoid feeling that it ought not to be the law, and that no business of this extensive and hazardous nature ought to be suffered to be carried on with no one for the major part of the time empowered to recognize and perform a duty which, at least on moral grounds, is so obvious and imperative. But we do not think such is the law."

needless suffering and loss of life.[1] And even though the agent had no authority to engage a physician, such an employment may be ratified, and it is held that a physician employed by the conductor of a train to care for a man injured by the train can recover against the railroad company for his services if, after knowledge of his employment by the conductor, the company failed to notify him that it would not be responsible.[2] The authority of such a subordinate agent, however, arises only with the emergency which makes it necessary for him to possess it, and ends with such emergency.[3] And neither a conductor,[4] a road-master,[5] a section agent,[6] a station agent,[7] nor

[1] In the case of Northern Central R. Co. *v.* State, 29 Md. 420, 96 Am. Dec. 545, a man was so injured by a collision with the defendant's train as to become unconscious. The company's agents believing him to be dead, but, without careful examination, laid him upon a box in a tool house and left him without care over night. The man recovered consciousness in the night, but, because of the lack of attention to his wounds, bled to death. The court held that it is the duty of agents in charge of a railroad train to take care of one injured by the train which they are operating, and to do it with a proper regard to his safety and the laws of humanity. And that the above facts were evidence that he came to his death by the negligence of the company's servants, although he may have been negligent in getting upon the track in the first place.

[2] Terre Haute & I. R. Co. *v.* Stockwell, 118 Ind. 98, 20 N. E. 650. To the same effect see Toledo, etc., R. Co. *v.* Rodrigues, 47 Ill. 188, where a letter was written to the general superintendent by the station agent, by whom a nurse and physician were employed, stating the facts, and he did not disclaim liability for the company. Toledo, etc., R. Co. *v.* Prince, 50 Ill. 26, holding that the superintendent, to escape liability, should repudiate the station agent's act in such a case and direct him to apprise the surgeon of such dissent. Louisville, etc., R. Co. *v.* McVay, 98 Ind. 391, holding the company bound by a ratification by the general manager of a contract for nursing made by the road-master. Indianapolis, etc., R. Co. *v.* Morris, 67 Ill. 295.

[3] Louisville, etc., R. Co. *v.* Smith, 121 Ind. 353.

[4] Indianapolis, etc., R. Co. *v.* Morris, 67 Ill. 295. A conductor having procured or consented to the attendance of a competent surgeon upon an injured brakeman can not bind the company by engaging additional surgeons. Louisville, N. A. & C. R. Co. *v.* Smith, 121 Ind. 353, 6 L. R. A. 320, 22 N. E. 775.

[5] Louisville, etc., R. Co. *v.* McVay, 98 Ind. 391.

[6] Tucker *v.* St. Louis, etc., R. Co., 54 Mo. 177. But see Bigham *v.* Chicago, etc., R. Co., 79 Iowa 534, 44 N. W. 805.

[7] Atlantic, etc., R. Co. *v.* Reisner, 18 Kan. 458, where the court says: "The authorities cited sustain the proposition that a station agent of a railroad company is not authorized, by virtue

the company's physician possessing authority to purchase medicines on the company's credit,[1] can bind it by a contract for nursing and care bestowed on an employe during a protracted illness, though such contracts may be ratified by the company[2] and made binding upon it if it owes either a legal or moral obligation to the injured party.[3] In the case of officers and superior agents having general authority to enter into contracts for the company, however, the courts hold that authority to procure care and medical attendance of an injured employe is incident to such general authority. Accordingly it is held that the general manager,[4] or the general superintendent,[5] or an assistant superintendent,[6] having general supervising

of his position as such agent, to employ a hotel-keeper, at the expense of the company, to attend to one of its brakemen, injured while working for the company, nor to furnish such employes with board and lodging while disabled."

[1] Mayberry *v.* Chicago, etc., R. Co., 75 Mo. 492, 11 Am. & Eng. R. Cas. 29.

[2] Indianapolis, etc., R. Co. *v.* Morris, 67 Ill. 295; Louisville, etc., R. Co. *v.* McVay, 98 Ind. 391.

[3] In Louisville, etc., R. Co. *v.* McVay, 98 Ind. 391, the court says: "There is no evidence as to how Barnett was injured; but inasmuch as the general manager ratified contracts for taking care of him, and the company paid for such service (except the claim of appellee), it should be presumed—there being no evidence to the contrary—that the injury was so inflicted as that the contract for his care was not *ultra vires*."

[4] Atlantic, etc., R. Co. *v.* Reisner, 18 Kan. 458; Walker *v.* Great Western R. Co., L. R. 2 Exch. 228. In this case, Chief Baron Kelley, in the course of the argument, inquired, "Must a board be convened before a man who has both legs broken can have medical assistance?" Louisville, etc., R. Co. *v.* McVay, 98 Ind. 391, where it is held that the courts will presume a general authority on the part of one holding the position of "general manager."

[5] Cincinnati, etc., R. Co. *v.* Davis, 126 Ind. 99; Terre Haute, etc., R. Co. *v.* Stockwell, 118 Ind. 98; Atchison, etc., R. Co. *v.* Reecher, 24 Kan. 228; Cairo, etc., R. Co. *v.* Mahoney, 82 Ill. 73; Toledo, etc., R. Co. *v.* Rodrigues, 47 Ill. 188. *Contra*, Stephenson *v.* New York, etc., R. Co., 2 Duer (N. Y.) 341. See Marquette, etc., R. Co. *v.* Taft, 28 Mich. 289, where a divided court, in an opinion written by Judge Cooley, Christancy, C. J., concurring, held that he has such power, Graves and Campbell, J. J., dissenting.

[6] Bigham *v.* Chicago, M. & St. P. R. Co., 79 Iowa 534; Pacific R. Co. *v.* Thomas, 19 Kan. 256. See Brown *v.* Missouri, etc., R. Co., 67 Mo. 122, holding that a division superintendent would not be presumed to have power to bind the company for "a small bill of drugs furnished a woman who had been hurt by the locomotive or cars of the company." The court says: "No proof was offered as to the duties of such officer, and the courts can not take judicial notice of them."

authority over the interests of a railroad company possesses authority to make such contracts on behalf of the company.[1] And in England it is held that the sub-inspector of railway police has implied power to employ surgical aid for an injured employe.[2] If the railroad company assumes to furnish a physician or surgeon to treat an injured passenger[3] or employe,[4]

[1] See Trenor *v.* Central Pacific R. Co., 50 Cal. 222; Cox *v.* Midland Counties R. Co., 3 Exch. 268; Tucker *v.* St. Louis, etc., R. Co., 54 Mo. 177; Indianapolis, etc., R. Co. *v.* Morris, 67 Ill. 295.

[2] Langan *v.* Great Western R. Co., 30 L. T. N. S. 173.

[3] In Secord *v.* St. Paul, etc., R. Co., 18 Fed. Rep. 221, 224, Shiras, J., says: "If it assumes the responsibility of engaging a surgeon, and placing him in charge of parties that may be injured, then it is responsible thus far; that the person it selects must be a competent man; he must be reasonably fitted for the duties which he is called upon to perform. In other words, it will not do for the company to take up some incompetent man, who is not fit by education or experience to undertake the responsibilities of any case that may be placed in his hand. If it does engage a physician and surgeon who is sufficiently experienced, that is all that can be expected of the railroad company, and is all of its liability."

[4] In the case of South Florida R. Co. *v.* Price, Notes of Cases, October, 1893, the supreme court of Florida says: "The plaintiff, however, in this case undertakes in his declaration to fasten liability upon the defendant company upon a further charge that a surgeon, who was employed by said company to render medical and surgical aid to injured employes, did, in the exercise of his duty as such physician and surgeon, set the injured arm of plaintiff in such an unskilled and negligent manner as to render it ill-shaped and forever useless to him in the performance of any manual labor. There is no allegation or proof that the physician and surgeon so alleged to have been employed by the defendant company was not competent and skilled in the line of his profession; and, in the absence of such allegation and the proof to sustain it, the defendant is not liable for any negligent exercise by such surgeon of his profession in the treatment of the plaintiff. Even though we should admit it to be within the corporate powers of such a company to obligate itself to the rendition of medical or surgical aid to its sick or injured employes, by assuming it as a duty or otherwise, or to become liable under any circumstances for any negligence of any such surgeon acting in the line of his profession, still it seems to be well settled that it will have performed its entire duty in that respect when it employs a person of ordinary competence and skill in that profession; and that, having done so, it can not be held liable for the carelessness or negligence of such surgeon in the performance of his duties as such. Secord *v.* Railway Co., 18 Fed. Rep. 221; McDonald *v.* Mass. etc., Hospital, 120 Mass. 432; O'Brien *v.* Cunard Steamship Co., 154 Mass. 272; Laubheim *v.* De Koninglyke N. S. Co., 107 N. Y. 228. From what has been said it becomes unnecessary to notice the errors as they are specifically assigned."

it takes upon itself only the obligation to furnish a competent man, skilled in his profession, and having done so is not responsible if he proves negligent in caring for this particular patient. In the absence of an express contract entered into on behalf of the company by some one authorized to represent it, a physician can have no claim against the company for services rendered to an injured employe or passenger. He can not render the services gratuitously and then sue the railway company upon an implied assumpsit.[1] And even though the company's representative may have promised on behalf of the company that his bill should be paid, a physician can not hold it liable where it does not appear that the services were rendered in reliance upon such promise or upon the credit of the company.[2]

§ 223. **Physicians and surgeons.**—If a railroad exercises reasonable care in selecting a physician or surgeon to treat an injured employe it is not liable for the acts of such surgeon or physician.[3] The physician or surgeon so employed does not become the agent of the company. As we have elsewhere said, there is no general duty to care for sick or injured employes

[1] Toledo, etc., R. Co. *v.* Rodrigues, 47 Ill. 188; Ellis *v.* Central Pacific R. Co., 5 Nev. 255.

[2] Northern Central R. Co. *v.* Prentiss, 11 Md. 119; Canney *v.* South Pacific Coast R. Co., 63 Cal. 501, where the court says: "The plaintiff, in his testimony and on the trial, admitted, and his witnesses proved, that the services were rendered in pursuance of his original employment by those who were wounded, and not otherwise. There was, therefore, no contract, express or implied, between the plaintiff and the defendant in relation to the services which are the subject of the suit, and as there is no prejudicial error in the record the judgment and order are affirmed."

[3] Pittsburgh, etc., Co. *v.* Sullivan, 141 Ind. 83, s. c. 40 N. E. R. 138; Laubheim *v.* De Koninglyke, etc., Co., 107 N. Y. 228, s. c. 13 N. E. R. 781; Eighmy *v.* Union Pac. Railway Co., (Iowa) 61 N. W. R. 1056; McDonald *v.* Mass., etc., Hospital, 120 Mass. 432; Secord *v.* St. Paul, etc., Railway Co., 18 Fed. R. 221; Union Pac. Railway Co. *v.* Artist, 60 Fed. R. 365; Fire Insurance Patrol *v.* Boyd, 120 Pa. St. 624, s. c. 15 Atl. R. 553; O'Brien *v.* Cunard Steamship Co., 154 Mass. 272, s. c. 28 N. E. R. 266; Haas *v.* Missionary Society, etc., 26 N. Y. Supp. 868, s. c. 6 Misc. R. 281; Van Tassell *v.* Manhattan, etc., Hospital, 15 N. Y. Supp. 620; Allan *v.* State Steamship Co., 132 N. Y. 91, s. c. 30 N. E. R. 482; South Railroad Co. *v.* Price, 32 Fla. 46, 13 So. R. 638.

or to employ surgeons to attend them.[1] There may be exceptional cases where an urgent emergency imposes upon the company a special duty to secure surgical attention, but, as elsewhere said, such a duty is transient and special, coming into existence with the emergency and with the emergency expiring.[2]

§ 224. **Delegation of power by directors.**—The directors are held to be superior officers and as such possessors of very extensive powers, and they may delegate to agents or employes authority of wide scope,[3] but they can not delegate powers which they are specially required to exercise by the provisions of the charter,[4] or by necessary implication. The powers which they are held by implication to be unable to delegate are generally said to be such as require the exercise of judicial or personal discretion as a board,[5] such as declaring dividends, making calls, leasing the franchises and property of the company or executing a mortgage upon them, or entering into a consolidation agreement with another company, where such powers are lodged in the directors.[6] What powers are and what are not specially enjoined upon the directors personally and required to be executed by them in person must generally be ascertained from the charter or act of incorporation. Powers of a legislative or judicial nature necessarily exercised in govern-

[1] Smith Master & Servant (Blacks' ed.), 302; Wennell *v.* Adney, 3 B. & P. 252; Cooper *v.* Phillips, 4 C. & P. 581; Sellen *v.* Norman, 4 C. & P. 80; Newby *v.* Wiltshire, 2 Esp. 739; Sevier *v.* Birmingham, etc., Co., 92 Ala. 258, 9 So. R. 405; Toledo, etc., Co. *v.* Rodrigues, 47 Ill. 188; Toledo, etc., Co. *v.* Prince, 50 Ill. 26; Cairo, etc., Co. *v.* Mahoney, 82 Ill. 73; Union, etc., Co. *v.* Beatty, 35 Kan. 265, s. c. 57 Am. R. 160.

[2] Pittsburgh, etc., Co. *v.* Sullivan, 141 Ind. 83, s. c. 40 N. E. R. 138.

[3] Hoyt *v.* Thompson, 19 N. Y. 207; Burrill *v.* Nahant Bank, 2 Metc. (Mass.) 163; Manchester, etc., R. Co. *v.* Fisk, 33 N. H. 297. The directors may appoint all necessary subordinate officers. Kitchen *v.* Cape Girardeau, etc., R. Co., 59 Mo. 514.

[4] *In re* County Palatine Loan, etc., Co., Cartmell's Case, 43 L. J. Eq. 588; Silver Hook Road *v.* Greene, 12 R. I. 164; Farmers' Mut. Ins. Co. *v.* Chase, 56 N. H. 341; York, etc., R. Co. *v.* Ritchie, 40 Me. 425; Read *v.* Memphis, etc., Co., 9 Heisk. (Tenn.) 545.

[5] Farmers' Mut. Ins. Co. *v.* Chase, 56 N. H. 341; Silver Hook Road *v.* Greene, 12 R. I. 164; Percy *v.* Millaudon, 3 La. 568.

[6] See, *ante* under the various titles of dividends, calls, etc.

ing the corporation can not be delegated unless the statute by express words or fair implication confers a right to delegate them.

§ 225. **Employment of subagents and servants.** — The general rule is that the authority of an agent can not be delegated unless power to delegate is expressly or impliedly conferred upon him. Authority to employ subagents may often be implied from the rank and position of the agent, but, as a rule, agents of inferior rank and limited authority can not rightfully employ other agents or servants. Ordinarily a mere agent can not, without the authority or consent, express or implied, of the corporation, employ another to perform the duties required of him so as to bind the corporation, especially in anything which requires the exercise of judgment and discretion,[1] or of skill,[2] in its performance. But in the case of superintendents, managers and agents invested with general powers, an authority to employ subordinate agents is implied from necessity and custom, even if not expressly given.[3]

§ 226. **Notice to agents or officers.** — Notice given to, or knowledge acquired by, an officer[4] or an agent of the corporation, when acting for the corporation within the scope of his author-

[1] Brewster *v.* Hobart, 15 Pick. (Mass.) 302; Gillis *v.* Bailey, 21 N. H. 149; Silver Hook Road *v.* Greene, 12 R. I. 164; York, etc., R. Co. *v.* Ritchie, 40 Me. 425.

[2] Everhart *v.* Terre Haute, etc., R. Co., 78 Ind. 292, where a brakeman employed plaintiff to perform some of his duties, and the plaintiff being injured by the company's negligence, the company was held not liable. Kent Com. (9th ed.), 854, 856.

[3] Wood's Field on Priv. Corp. (1883), § 183. When the regular brakeman is absent, and the proper and safe management of the train so requires, the conductor has authority to supply the place of the absent brakeman, and, for the time being, such person is an employe of the railroad, with all of an employe's rights. Sloan *v.* Central R. Co., 62 Iowa 728.

[4] Notice to the president when acting for the corporation is notice to the corporation. Hoffman, etc., Co. *v.* Cumberland, etc., Co., 16 Md. 456; First Nat. Bank *v.* Gifford, 47 Iowa 575; Barnes *v.* Trenton Gas Co., 27 N. J. Eq. 33. But the notice or information must be given or acquired while he was acting as president. Winchester *v.* Baltimore, etc., R. Co., 4 Md. 231; Miller *v.* Illinois Central R. Co., 24 Barb. (N. Y.) 312. So notice to the secretary was held sufficient. Trenton Banking Co. *v.* Woodruff, 2 N. J. Eq. 117.

ity,[1] concerning matters about which he is acting or has authority to act, will be imputed to the corporation.[2] But the knowledge must be shown to relate to the business of his agency, and must not be merely casual knowledge, but knowledge acquired while acting as agent.[3] And the corporation will be chargeable with notice of all facts within the knowledge of a person assuming to act for it, relative to the business in hand, in case it ratifies and adopts his acts.[4] Notice to or notice acquired by an individual stockholder will not bind the corporation,[5] and the fact that he afterwards becomes an officer will not render it binding.[6] The weight of authority is to the effect that notice to an agent at some previous time and when he was engaged in a different business will not bind his principal unless it is shown to have been actually disclosed to him,[7] and the better reason supports this rule. Very respectable author-

[1] Schenck *v.* Mercer County Mut. Ins. Co., 24 N. J. L. 447; Goodall *v.* New Eng. Mut. Fire Ins. Co., 25 N. H. 169. But such knowledge should be imputed to the corporation only so long as the agency remains; and where an agent possessing knowledge not acquired by any usage, custom or course of business of the company, such as knowledge of the arbitrary mark of a consignee of goods shipped by railroad, ceases to serve as agent, the company can not be charged with such knowledge. Great Western Railway *v.* Wheeler, 20 Mich. 419. See, generally, Pittsburgh, etc., Co. *v.* Ruby, 38 Ind. 294; Ohio, etc., Co. *v.* Collarn, 73 Ind. 261.

[2] It is essential that notice should relate to matters over which the authority of the agent extends and should be more than mere casual information gathered as an individual. Day *v.* Wamsley, 33 Ind. 145.

[3] Brown *v.* Bankers', etc., Tel. Co., 30 Md. 39.

[4] Hovey *v.* Blanchard, 13 N. H. 145.

[5] Danville Bridge Co. *v.* Pomroy, 15 Pa. St. 151; Nashville, etc., R. Co. *v.* Elliott, 1 Coldw. (Tenn.) 611; Black *v.* Camden, etc., R. Co., 45 Barb. (N. Y.) 40.

[6] Housatonic Bank *v.* Martin, 42 Mass. (1 Met.) 294; Union Canal Co. *v.* Loyd, 4 W. & S. (Pa.) 393.

[7] Miller *v.* Illinois Central R. Co., 24 Barb. (N. Y.) 312; Reed's Appeal, 34 Pa. St. 207; Keenan *v.* Missouri Ins. Co., 12 Iowa 126; Pepper *v.* George, 51 Ala. 190; U. S. Ins. Co. *v.* Shriver, 3 Md. Ch. 381; Winchester *v.* Baltimore, etc., R. Co., 4 Md. 231; Plympton *v.* Preston, 4 La. Ann. 356; Washington Bank *v.* Lewis, 22 Pick. (Mass.) 24; Astor *v.* Wells, 4 Wheat. (U. S.) 466. In McComb *v.* Chicago, etc., R. Co., 7 Fed. R. 426, it was held that an officer could not be made a party to a bill of discovery when he did not derive his information in his official capacity, but derived it from a participation in the creation of the corporation.

ity, however, holds that notice or knowledge received by an agent before he was appointed as such is imputable to the principal in regard to matters in which he is afterward employed, if it can be shown that the facts were then present in the agent's mind; but this doctrine we regard as unsound.[1] The rule in England[2] is that which we have said we believe to be supported by the better reason.[3]

§ 227. **Ratification.**—Even though the agent is not shown to have received any authority from the corporation, and it does not appear that he has been held out to the world as possessing any such authority, and no former acts of his are shown from which his authority as an agent could be presumed, yet the corporation will be bound if it is shown to have ratified the particular act in question[4] by express adoption of the contract,[5] either in whole or in part,[6] by availing itself of the proceeds or benefits arising from an execution of the contract by the other party,[7] or by neglecting to disavow and actively con-

[1] The Distilled Spirits, 11 Wall. (U. S.) 356; Fairfield Savings Bank *v.* Chase, 72 Me. 226; Ingalls *v.* Morgan, 10 N. Y. 178; Hovey *v.* Blanchard, 13 N. H. 145; Lebanon Savings Bank *v.* Hollenbeck, 29 Minn. 322.

[2] Dresser *v.* Norwood, 17 C. B. N. S. 466; But the older cases hold to the other rule. Preston *v.* Tubbin, 1 Vern. 286; Lowther *v.* Carlton, 2 Atk. 242; Hiern *v.* Mill, 13 Ves. 114.

[3] For cases forming exceptions to the general rule that notice to the agent is notice to the principal, see Thompson, etc., Co. *v.* Capitol, etc., Co., 65 Fed. R. 341; Allen *v.* South Railroad Co., 150 Mass. 200, s. c. 22 N. E. R. 917; Kennedy *v.* Green, 3 Mylne & K. 699; Espin *v.* Pemberton, 3 De Gex & J. 547; Rolland *v.* Hart, L. R. 6 Ch. App. 678; Cave *v.* Cave, L. R. 15 Ch. Div. 639; Kettlewell *v.* Watson, L. R. 21 Ch. Div. 685, 707; Innerarity *v.* Bank, 139 Mass. 332; De Kay *v.* Hackensack Water Co., 38 N. J. Eq. 158; Frankel *v.* Hudson, 82 Ala. 158, 2 So. R. 758. The doctrine of the cases cited is that when the agent is attempting to defraud his principal notice to him is not notice to the principal.

[4] Stuart *v.* London, etc., R. Co., 16 Jur. 209, 10 Eng. L. & Eq. 57. Evidence that representatives of a corporation agreed that certain land should be used as a highway and that such agreement was afterward ratified is not rendered inadmissible by the fact that no such authority was given the representatives in the resolution authorizing the purchase of the land. People *v.* Eel River & E. R. Co., 98 Cal. 665.

[5] McLaughlin *v.* Detroit, etc., R. Co., 8 Mich. 99.

[6] U. S. Rolling Stock Co. *v.* Atlantic, etc., R. Co., 34 Ohio St. 450.

[7] Bangor, etc., R. Co. *v.* Smith, 47 Me. 34; Scott *v.* Middletown, etc., R.

demn the unauthorized act for a long time and until innocent third persons have been thereby induced to put themselves in a position from which they can not be taken without loss if the act should be held invalid.[1] What is a reasonable time in which to disavow an act of the agent after being informed of what he has done will depend upon the particular circumstances of the case. If the corporation and its officers have knowledge that the other contracting party is making large expenditures on the faith of the contract, they must act promptly if they would disaffirm it.[2] Ratification from long silence has been held a question for the jury.[3] But ratification should not be lightly presumed, especially where the act is wholly beyond the ordinary duties of the officer or agent performing it;[4] for no individual member can represent the corporation in its aggregate capacity, except by consent. Thus, proof that the plaintiff's men were seen at work upon a turnpike road by different members of the corporation owning it, and by its agent who was authorized to bind the corporation only by written contracts, was held insufficient to establish a claim for pay for such work, where it was not shown that any authorized agent of the corporation, or any one who had previously acted for the corporation in such matters, had requested that the work should be done or promised to pay for it.[5]

Co., 86 N. Y. 200; Gilman, etc., R. Co. *v.* Kelly, 77 Ill. 426; Davidson *v.* Bridgeport, 8 Conn. 472; Hilliard *v.* Goold, 34 N. H. 230. When a corporation receives, without objection, the benefit of a contract made by any agent in its behalf, for a purpose authorized in its charter, it may be presumed to have authorized or ratified the contract. Pittsburgh, etc., R. Co. *v.* Keokuk, etc., Co., 131 U. S. 371.

[1] Sheldon, etc., Co. *v.* Eickemeyer, etc., Co., 90 N. Y. 607; Hazlehurst *v.* Savannah, etc., R. Co., 43 Ga. 13; U. S. Rolling Stock Co. *v.* Atlantic, etc., R. Co., 34 Ohio St. 450.

[2] U. S. Rolling Stock Co. *v.* Atlantic, etc., R. Co., 34 Ohio St. 450.

[3] First Nat. Bank *v.* Reed, 36 Mich. 263. See 1 Elliott's Gen. Pr., § 426.

[4] Kersey Oil Co. *v.* Oil Creek, etc., R. Co., 12 Phila. 374.

[5] Hayden *v.* Middlesex Turnp. Co., 10 Mass. 397. See Cox *v.* Midland R. Co., 18 Law J. N. S. Exch. 65. But where an engineer who had previously made such contracts which had been ratified by the corporation, promised that parties furnishing materials to build a bridge for the company should be paid, it was held bound by such promise. Beattie *v.* Delaware, etc., R. Co., 90 N. Y. 643.

§ 228. **Acts that may be ratified.**—It is competent for a railroad company to ratify any act of an agent performed within the scope of the corporate power. The general rule is that a corporation can only ratify contracts which it has power to enter into,[1] and it is powerless to ratify one which it is prohibited from making by its charter, by public policy or by general statute.[2] It is, in general, true that a void act can not be ratified. A recovery may be had on the *quantum meruit* in many cases for the value of the property actually received by the company. Such a recovery does not, as a general rule, rest upon the void contract, but there are cases which hold that a recovery can be had on the contract.[3]

§ 229. **Ratification—What constitutes.**—A ratification will be presumed only in case the corporation was aware of all the material facts and circumstances which would influence it in adopting or rejecting the contract,[4] or had such means of knowing that it was chargeable with negligence in not being informed of them.[5] The rule stated is a familiar one, and little else than its bare statement is required. We refer in the note

[1] Scott *v.* Middletown, etc., R. Co., 86 N. Y. 200; U. S. Rolling Stock Co. *v.* Atlantic, etc., R. Co., 34 Ohio St. 450; Boston, etc., R. Co. *v.* New York, etc., R. Co., 13 R. I. 260; Pacific R. Co. *v.* Thomas, 19 Kan. 256; Board, etc., *v.* Lafayette, etc., R. Co., 50 Ind. 85; Miller *v.* Rutland, etc., Co., 36 Vt. 452.

[2] Such a contract is as if no contract had ever been made, and, of course, incapable of ratification. Alexander *v.* Cauldwell, 83 N. Y. 480; Davis *v.* Old Colony R. Co., 131 Mass. 258; Martin *v.* Zellerbach, 38 Cal. 300; Taymouth Tp. *v.* Koehler, 35 Mich. 22.

[3] Hitchcock *v.* Galveston, 96 U. S. 341; Dill *v.* Inhabitants of Wareham, 7 Metcf. 438; Schipper *v.* City of Aurora, 121 Ind. 154, 158; State Board, etc., Co. *v.* Citizens', etc., Co., 47 Ind. 407; Bissell *v.* Michigan, etc., Co., 22 N. Y. 258; DeGroff *v.* American, etc., Co., 21 N. Y. 124; Missouri Pacific Co. *v.* Sidell, 67 Fed. R. 464; Whitney Arms Co. *v.* Barlow, 63 N. Y. 62; Railway Co. *v.* McCarthy, 96 U. S. 258; Bank *v.* Patterson, 7 Cranch. 299; Pennsylvania R. Co. *v.* Keokuk, etc., Co., 131 U. S. 371, s. c. 9 Sup. W. R. 770; Davis *v.* Old Colony Railroad Co., 131 Mass. 258; Louisiana *v.* Wood, 102 U. S. 294; City of Parkersburg *v.* Brown, 106 U. S. 487, s. c. 1 Sup. Ct. R. 442; Pennsylvania, etc., Co. *v.* St. Louis, etc., Co., 118 U. S. 290, s. c. 6 Sup. Ct. R. 1094.

[4] Gilman, etc., R. Co. *v.* Kelly, 77 Ill. 426.

[5] Hotchin *v.* Kent, 8 Mich. 526; Exchange Bank *v.* Monteath, 17 Barb. (N. Y.) 171.

to a few of the great number of cases which assert and apply the rule.[1]

§ 230. **Compensation of officers.**—As a general rule there is no implied promise to pay corporate officers anything for their services, but they are presumed to serve without compensation unless some provision for payment is made by statute, by contract, or by resolution of the board of directors.[2] Where a certain compensation is agreed upon before the services are rendered, payment of it will be enforced. Accordingly, it is held that a by-law of a corporation, providing that "no debts shall be contracted by the company unless there are funds in the treasury to meet the same," does not apply to the salary of the secretary of such corporation, especially when it has received the consideration for the indebtedness contracted.[3] And a by-law or resolution adopted by the directors of a corporation that the salary of the president shall be paid monthly out of the money that may come into the hands of the treasurer from the first sale of bonds is held not to exempt the corporation from

[1] Western, etc., Bank *v.* Armstrong, 152 U. S. 346, s. c. 14 Sup. Ct. R. 572; Battaglia *v.* Thomas, 5 Tex. Civ. App. 563, s. c. 23 S. W. R. 1118; First Nat. Bank *v.* Badger, etc., Co., 54 Mo. App. 327; Russ *v.* Telfener, 57 Fed. R. 973; Sherrill *v.* Weisiger, etc., Co., 114 N. C. 436, s. c. 19 S. E. R. 365. It is familiar and established law that the act of an agent must be ratified in *toto* or entirely repudiated. Rader *v.* Maddox, 150 U. S. 128, s. c. 14 Sup. Ct. R. 46; Nicklase *v.* Griffith, 59 Ark. 641, 26 S. W. R. 381; Stanard Milling Co. *v.* Flower, 46 La. Ann. 315, s. c. 15 So. R. 16; Brown *v.* Parsons, 10 Utah 223, s. c. 37 Pac. 346; Graff *v.* Callahan, 158 Pa. St. 389, s. c. 27 Atl. R. 1009; Tallman *v.* Kimball, 74 Hun 279. A principal who seeks to escape liability for the unauthorized act of the agent must repudiate it within a reasonable time after it comes to his knowledge. Swartz *v.* Duncan, 38 Neb. 782, s. c. 57 N. W. R. 543.

[2] Officers of corporations are presumed to perform the duties of their trust gratuitously, unless otherwise provided by a statute or a contract. Smith *v.* Putnam, 61 N. H. 632; Barril *v.* Calendar Insulating & W. P. Co., 50 Hun 257, s. c. 19 N. Y. S. R. 877; Toponce *v.* Corinne Mill, C. & S. Co., 6 Utah 439, 24 Pac. R. 534. There is no implied promise to pay the president of a private corporation for his services. McAvity *v.* Lincoln Pulp & P. Co., 82 Me. 504, 20 Atl. 82. See McMullen *v.* Ritchie, 64 Fed. R. 253; Starbuck *v.* Housatonac R. Co., 83 Hun 534, s. c. 32 N. Y. S. 87; Potts *v.* Rose Valley Mills, 167 Pa. St. 310, 31 Atl. R. 655.

[3] McCracken *v.* Halsey Fire Engine Co., 57 Mich. 361, 24 N. W. R. 104.

liability therefor in case the bonds are not sold.[1] Officers and agents, of whom active duties are required, not chosen from among the directors are, ordinarily, entitled to a reasonable compensation for services rendered at the request of the corporation or of its authorized representatives.[2] Payment for labor as well as for materials useful in carrying on the business of the corporation may usually be made in money or its equivalent; and, if in the latter, the transaction can not be impeached for error of judgment on the part of the officers as to the value of the services or property.[3]

§ 231. **Individual liability of agents for their torts.**— Although the corporation becomes bound to answer for any wrongs committed by an agent in the course of his employment, the agent is not thereby discharged from liability. He must answer for his frauds,[4] misrepresentations,[5] and other wrongful acts,[6] even though he does them by the express direction of a superintendent or other superior officer of the corporation.[7]

[1] Indianapolis, etc., R. Co. *v.* Hyde, 122 Ind. 188. But a resolution fixing the salary of a charter officer elected for one year at a sum certain per month does not necessarily fix that rate for the year. Bennett *v.* St. Louis Car Roofing Co., 23 Mo. App. 587.

[2] Rogers *v.* Hastings, etc., R. Co., 22 Minn. 25; Missouri River R. Co. *v.* Richards, 8 Kan. 101; St. Louis, etc., R. Co. *v.* Grove, 39 Kan. 731. Where, at the request of a corporation, a man became its general agent and purchased a large number of shares of its capital stock, and gave active and valuable service to the company, expecting that when it became prosperous he would have a large salary for the future, with some compensation for the past, but with no agreement as to salary—the fact that he stated several times to other stockholders that he was serving without compensation will not defeat his right to reasonable pay for his services when the corporation has become insolvent. Bard *v.* Banigan (C. C. D. Conn.) 39 Fed. R. 13.

[3] Arapahoe Cattle & Land Co. *v.* Stevens, 13 Colo. 534, 28 Am. & Eng. Corp. Cas. 12, 22 Pac. 823.

[4] Dodgson's Case, 3 De Gex & S. 85; Atty-Gen. *v.* Corp. of Leicester, 7 Beav. 176.

[5] Salmon *v.* Richardson, 30 Conn. 360; Meyer *v.* Amidon, 45 N. Y. 169; Fusz *v.* Spaunhorst, 67 Mo. 256; Henderson *v.* Lacon, L. R. 5 Eq. 249.

[6] Horner *v.* Lawrence, 37 N. J. L. 46; Harriman *v.* Stowe, 57 Mo. 93; Crane *v.* Onderdonk, 67 Barb. (N. Y.) 47; Berghoff *v.* McDonald, 87 Ind. 549; Elmore *v.* Brooks, 6 Heisk. (Tenn.) 45; Richardson *v.* Kimball, 28 Me. 463.

[7] City of Duluth *v.* Mallett, 43 Minn. 204, where the conviction of an engineer for obstructing a crossing was

§ 232. **Bonds of officers and agents.**—The officers and agents of a corporation are liable to it for any losses occasioned by their misconduct or neglect,[1] and it is competent for the corporation to take a bond from an officer or agent to secure the faithful performance of his duty. The right to require such a bond is given by statute in many states,[2] but such statutes are but an affirmance of the common law,[3] and any corporation may pass a valid by-law requiring security to be given by its agents.[4] Even though the charter prescribes the security to be taken, such provision will be held merely directory and a different bond may be enforced against the sureties in case of the agent's default.[5] If the bond is executed and delivered to the corporation, and the officer enters upon the discharge of his duties, it may be enforced against the sureties upon a breach of its conditions without showing any formal acceptance of it by the directors.[6] A total failure to execute any bond whatever will not prevent the person appointed to an office from being a legal agent of the corporation, even where the charter provides that he shall "give bond before he enters upon the duties of his office,"[7] although a failure to require a bond may render the officers whose duty it was to require the bond liable for any loss resulting from their failure to do so.[8]

upheld, though it appeared that he acted only in obedience to orders.

[1] Pontchartrain R. Co. *v.* Paulding, 11 La. 41; Lexington R. Co. *v.* Bridges, 7 B. Mon. (Ky.) 556.

[2] Stimson's Am. Stat. (1892), §§ 8046, 8533, citing laws of Massachusetts, Vermont, Connecticut, New York, Pennsylvania, Arkansas, West Virginia, Texas, Nevada, Utah, Indiana, Michigan, Illinois, Arizona, Colorado, Montana, Wyoming, District of Columbia.

[3] Angell & Ames (8th ed.), § 285.

[4] Bank of United States *v.* Dandridge, 12 Wheat. (U. S.) 64. See Bank of North Liberties *v.* Cresson, 12 Serg. & R. (Pa.) 306; Peppin *v.* Cooper, 2 B. & Ald. 431.

[5] As where the charter prescribed a bond with two sureties, and a bond with only one surety was taken. Bank of Northern Liberties *v.* Cresson, 12 Serg. & R. (Pa.) 306.

[6] Amherst Bank *v.* Root, 2 Metc. (Mass.) 522.

[7] Bank of United States *v.* Dandridge, 12 Wheat. (U. S.) 64. But if the charter especially provided that he should not be deemed for any purpose in his office until an approval of his bond by the proper board, any acts which he did before such approval would be utterly void. Bank of United States *v.* Dandridge, 12 Wheat. (U. S.) 64, per Story, J.

[8] Pontchartrain R. Co. *v.* Paulding, 11 La. 41.

A bond is not void as to the obligors because it is signed by the officers who should examine and approve it,[1] nor because the officer neglected to be sworn.[2] But, if the principal knows of some fact which will materially affect the liability of the sureties,[3] as that he is being cheated by an agent,[4] and applies for security for the good conduct of the agent, but conceals this fact from the one who, in ignorance of it, becomes a surety for the agent, the obligation so obtained may be avoided by the surety. The corporate representative must, if fit opportunity offers, inform the surety of any material facts within his knowledge relative to the trustworthiness of the officer, such as prior defaults and the like, or the surety will not be bound.[5] And the corporation can not, upon misconduct of the agent amounting to a substantial breach of the bond after it is executed, retain him in its employ and yet hold the sureties liable for his future defaults, unless notice is given to the sureties and they expressly or impliedly consent to the agent's retention.[6] The fact that the agent is retained will not relieve the surety from a liability already accrued.[7] As a general rule the corporation is not bound upon discovering that an officer is in default to dismiss the officer and notify the sureties in order that they may take measures to protect themselves.[8] And where the officer or employe was a defaulter at the time of giving the bond, but this fact was unknown to the company,

[1] Amherst Bank *v.* Root, 2 Metc. (Mass.) 522.

[2] State Bank *v.* Chetwood, 8 N. J. L. 1.

[3] Franklin Bank *v.* Stevens, 39 Me. 532.

[4] Maltby's Case, cited in 1 Dow. 294. Where a station agent at the time of signing the official bond is in default, and the sureties are not informed of that fact, they will not be bound. Wilmington, etc., R. Co. *v.* Ling, 18 S. C. 116.

[5] Western N. Y. L. Ins. Co. *v.* Clinton, 66 N. Y. 326; Ætna Life Ins. Co. *v.* Mabbett, 18 Wis. 667; Franklin Bank *v.* Cooper, 36 Me. 179; Dinsmore *v.* Tidball, 34 Ohio St. 411; Graves *v.* Lebanon Nat. Bank, 10 Bush. (Ky.) 23; State *v.* Atherton, 40 Mo. 209.

[6] Phillips *v.* Foxall, L. R. 7 Q. B. 666; Taylor *v.* Bank of Ky., 2 J. J. Marsh (Ky.) 564; Wilmington, etc., R. Co. *v.* Ling, 18 S. C. 116.

[7] State Bank *v.* Chetwood, 8 N. J. L. 1; Union Bank *v.* Forstall, 11 La. 211.

[8] Pittsburg, etc., R. Co. *v.* Shaeffer, 59 Pa. St. 350; Morris Canal, etc., Co. *v.* Van Vorst's Admx., 21 N. J. L. 100; Peel *v.* Tatlock, 1 Bos. & Pull. 419; Grocers' Bank *v.* Kingman, 16 Gray (Mass.) 473.

or where the corporation retains him in its employ after his default, but in ignorance of his misconduct, the surety is not thereby discharged, even though such ignorance arises from the negligence of officers of the corporation in failing to examine into the accounts of the person under bond.[1] The mere fact that a balance was due from the agent to the principal on account of money received by him, where it did not carry an imputation of misconduct on the part of the agent, was held not a material fact, the concealment of which would release the surety.[2] And the fact that a balance is found to be due from the agent to the corporation, and he is afterward allowed to continue in its employ will not necessarily release the sureties, for it is only where the default is evidently a dishonest one, amounting to a breach of the bond, that the corporation is bound to discharge the delinquent.[3] A bond will be presumed to be executed with reference to the time for which the officer or agent is appointed, if for a term certain, and the sureties can not be held liable for his misconduct in any subsequent terms for which he may be chosen.[4] But they may, by the use of apt words in the bond, bind themselves for an indefinite number of successive terms during which he may hold his position.[5] Where one gives a bond as an officer of a corporation whose charter will soon expire, his bondsmen can not be held liable for his defalcations while acting as an officer under an extension of the charter.[6] But the adoption of a by-law changing the time for holding the annual meeting, or

[1] Bowne *v.* Mt. Holly Nat. Bank, 45 N. J. L. 360; Watertown F. Ins. Co. *v.* Simmons, 131 Mass. 85; Atlas Bank *v.* Brownell, 9 R. I. 168; Black *v.* Ottoman Bank, 15 Moore P. C. 472.

[2] Guardians, etc., *v.* Strother, 24 Eng. Law & Eq. 183, s. c. 22 L. T. 84; Wilmington, etc., R. Co. *v.* Ling, 18 S. Car. 116; Watertown Ins. Co. *v.* Simmons, 131 Mass. 85. See Vilwig *v.* Baltimore, etc., R. Co., 79 Va. 449.

[3] Atlantic, etc., Tel. Co. *v.* Barnes, 64 N. Y. 385; Richmond, etc., R. Co. *v.* Kasey, 30 Gratt. (Va.) 218.

[4] Chelmsford Co. *v.* Demarest, 7 Gray (Mass.) 7; Manufacturers', etc., Loan Co. *v.* Odd Fellows' Hall Assn., 48 Pa. St. 446; Exeter Bank *v.* Rogers, 7 N. H. 21.

[5] Middlesex Manf. Co. *v.* Lawrence, 1 Allen (Mass.) 339. See Lexington, etc., R. Co. *v.* Elwell, 8 Allen (Mass.) 371; Eastern R. Co. *v.* Loring, 138 Mass. 381; Consolidated Nat. Bank *v.* Fidelity, etc., Co., 67 Fed. R. 874.

[6] Thompson *v.* Young, 2 Ohio 334.

changing the mode of conducting the business of the corporation after the termination of a lease of its property will not discharge the sureties.[1] It has also been held that the obligation of a bond is not avoided by the amalgamation of the company to which it was given with another under an act of parliament providing that all the securities of the old companies should be vested in the new, and the duties of the officer were unchanged.[2]

§ 233. **Sureties—Bonds of officers and agents.**—The rules which govern as to the effect of changes in obligations of sureties apply to sureties on the bonds of corporate officers and agents. We shall not discuss the subject at length, but will refer to some general rules. A change in the contract in any material part, without the consent of the surety, will discharge him from his obligation,[3] as where one who is working for a salary goes to work on a commission,[4] or where one who gives bond as agent for an insurance company which has no authority to engage in banking is intrusted by it with the business of banking for the corporation, and embezzles funds intrusted to him for that purpose.[5] But a surety on the bond of a ticket seller, conditioned for his faithful performance of "all the duties of the said office which are or may be imposed upon him under this or any future appointment," is not released by the fact that the capital stock of the corporation is increased, that the travel becomes much greater, and that the ticket agent's salary is nearly doubled after the bond is given.[6] The sureties on the official bond of an officer or agent of a private corporation conditioned for the faithful performance of his duties will not be held to any greater liability than would attach to the agent if no bond were given,

[1] Lexington, etc., R. Co. *v.* Elwell, 8 Allen (Mass.) 371.

[2] Eastern Union R. Co. *v.* Cochrane, 24 Eng. L. & Eq. 495; London, etc., R. Co. *v.* Goodwin, 3 Exch. 320.

[3] Miller *v.* Stewart, 9 Wheat. (U. S.) 680.

[4] Northwestern R. Co. *v.* Whinray, 26 Eng. L. & Eq. 488.

[5] Blair *v.* Perpetual Ins. Co., 10 Mo. 559.

[6] Eastern R. Co. *v.* Loring, 138 Mass. 381; Strawbridge *v.* Baltimore, etc., R. Co., 14 Md. 360. See, also, Bank of Wilmington *v.* Wollaston, 3 Harr. (Del.) 90; Morris Canal & Banking Co. *v.* Van Vorst's Admx., 21 N. J. L. 100.

unless the language of the bond clearly requires it.[1] Such a bond has reference to the agent's honesty,[2] and binds him only to the reasonable skill and ordinary diligence in performing the duties of his office[3] to which he is bound by the terms of an ordinary employment. And where a sum of money belonging to the corporation is stolen from the agent without his fault, his sureties can not be held liable upon a bond which provides that he shall "well, truly and faithfully perform the duties required of him, * * * and promptly pay over and promptly account for all moneys belonging to said company which shall be received by him as such agent."[4] The corporation can not, without the unanimous consent of the stockholders, condone gratuitously the fraud of its officers.[5]

[1] Chicago, etc., R. Co. *v.* Bartlett, 120 Ill. 603; Baltimore, etc., R. Co. *v.* Jackson, 33 Alb. L. J. 239; Planters', etc., Bank *v.* Hill, 1 Stew. (Ala.) 201.

[2] Union Bank *v.* Clossey, 10 Johns. (N. Y.) 271, 11 Johns. 182.

[3] American Bank *v.* Adams, 12 Pick. (Mass.) 303. An officer of a private corporation is liable only for the care required of an ordinary trustee or bailee for hire, and is not an insurer of property coming into his hands. Mowbray *v.* Antrim, 123 Ind. 24; Wayne Pike Co. *v.* Hammons, 129 Ind. 368.

[4] Chicago, etc., R. Co. *v.* Bartlett, 120 Ill. 603; Baltimore, etc., R. Co. *v.* Jackson, 33 Alb. L. J. 239. So where property is lost without his fault. Mowbray *v.* Antrim, 123 Ind. 24.

[5] Hazard *v.* Durant, 11 R. I. 195.

CHAPTER XII.

DIRECTORS.

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§ 234. **Different classes of officers—Generally.**—In the preceding chapter we have in a general way treated of the officers and agents of railway companies and shall now consider that class of corporate officers that may be said to be the governing officers of the corporation. Some of these officers are invested with powers that resemble governmental, legislative and judicial powers, while others are executive or ministerial officers. The common law rule was quite strict and under it only the members of the board of directors, or the governing board by whatever name designated, were regarded as officers of such superior rank and authority as to constitute them very much more than agents and servants,[1] but this doctrine has been greatly limited.

§ 235. **The governing board — Generally.** — The power of corporate government is vested in a board of officers generally denominated "board of directors" or "board of trustees." The governing board is the highest representative of the corporation. The members of the board are the officers in whom are lodged the primary and highest corporate powers. They actively exercise the powers of the corporation, and, while it is true that the powers they exercise are in a sense delegated to them, yet their powers are not delegated powers in the same sense as are the powers conferred upon agents, attorneys or employes.[2] The governing board must, under many statutes,

[1] Priestley *v.* Fowler, 3 M. & W. 1; Hutchinson *v.* York, etc., Co., 5 Exch. 343; Murray *v.* South Carolina R. Co., 1 McMullan (S. C.) 385; Farwell *v.* Boston, etc., Co., 4 Metc. (Mass.) 49; McFarlane *v.* Caledonian, etc., Co., 6 Macph. (Sc. Ct. of Sessions, 3d Ser.) 102; Bartonshill, etc., Co. *v.* Reid, 3 Macq. 266.

[2] Bliss *v.* Kaweah, etc., Co., 65 Cal. 502. See, generally, Conro *v.* Port Henry, etc., Co., 12 Barb. 27; Union,

exercise all corporate powers, for, while the shareholders select the members of the board, the board exercises powers which those who put them in office can not rightfully exercise. As a rule corporate powers must be exercised by the governing board, or through agents and servants appointed directly or indirectly by it. Where the act of incorporation requires corporate powers to be exercised by the governing board they can not be exercised by any other corporate department officers or agents, for where the mode of corporate action is prescribed it must be pursued.[1] The members of the governing board are usually designated as the directors, and we shall employ that term as a generic one denoting the officers invested with the principal governmental powers.

§ 236. **Governing board not the corporation.**—The board of directors is not the corporation unless made so by the act of incorporation.[2] Statements are found in some of the books and cases which seem to indicate that the board of directors constitute the corporation.[3] These statements, as we believe, assert an erroneous doctrine, for broad and comprehensive as are the powers of the board of directors, the body politic and corporate is distinct from the board, and there are corporate powers which the board can not exercise. The board can not, unless expressly authorized by the act of incorporation, pre-

etc., Co. *v.* Rocky Mountain, etc., Co., 2 Col. 565; McCullough *v.* Moss, 5 Den. (N. Y.) 567, 575; Dana *v.* Bank of United States, 5 Watts & S. 223.

[1] Beatty *v.* Manne Ins. Co., 2 Johns 109; People *v.* Utica, etc., Co., 15 Johns 358, 383; New York, etc., Co. *v.* Ely, 2 Cow. 678; *Ex parte* Willocks, 7 Cow. 402; Hosack *v.* College, etc., 5 Wend. 547.

[2] Grant on Corporations, 365; Reg. *v.* Paramore, 10 A. & E. 286; Regina *v.* York, 2 Q. B. 847; Mayor, etc., *v.* Simpson, 8 Q. B. 65.

[3] Maynard *v.* Firemen's Ins. Fund, 34 Cal. 48. See, generally, Hoyt *v.* Thompson, 19 N. Y. 207; Leavitt *v.* Oxford, etc., Co., 3 Utah 265, s. c. 4 Am. & Eng. Corp. Cas. 234; Miller *v.* Rutland, etc., R. Co., 36 Vt. 452; Cleveland, etc., R. Co. *v.* Himrod, etc., Co., 37 Ohio St. 321. Judge Redfield says: "As a general rule it may be safely affirmed that the board of directors have all the power which resides in the corporation, subject to such restrictions only as are imposed upon by the charter and by-laws of the corporation." Redfield on Railways, 136. This statement, we venture to say, with deference to its learned author, is somewhat too broad and requires limitation.

scribe the qualifications of its own members, enact by-laws, amend articles of association, increase capital stock or effect a consolidation with another company, for power to do these things, and others, dwells elsewhere.[1]

§ 237. **The board of directors represents the corporation.** —When duly organized and officially acting within the scope of the authority conferred upon it by the charter or the valid by-laws of the corporate body, the board of directors represents and acts for the corporation to the exclusion of the individual stockholders. As we have elsewhere said, action by the stockholders where the charter, or act of incorporation, requires action by the board of directors, is ineffective. In such cases the stockholders are substantially strangers to the corporation so far as corporate action is concerned. They elect the directors, but they can not perform the duties or exercise the functions enjoined upon the board of directors by law. The stockholders are not co-owners of the corporate property, and hence can not act in regard to it as joint-owners of property can do where the title is in natural persons.[2] Shareholders can not

[1] State *v.* Adams, 44 Mo. 570; Dayton, etc., R. Co. *v.* Hatch, 1 Disney (Ohio) 84; Commonwealth *v.* Cullen, 13 Pa. St. 133; Chicago, etc., Co. *v.* Allerton, 18 Wall. 233. In Nashua, etc., Co. *v.* Boston, etc., Co., 27 Fed. R. 821, "The general power of the board of directors to perform all corporate acts refers to ordinary transactions and not to fundamental and organic changes, like increasing its capital stock or leasing its plant," citing Cass *v.* Manchester, etc., Co., 9 Fed. R. 640; Thomas *v.* Railroad Co., 101 U. S. 71.

[2] Williamson *v.* Smoot, 7 Mart. (La.) O. S. 31; Mickles *v.* Rochester, etc., Bank, 11 Paige 118, s. c. 42 Am. Dec. 103; Spurlock *v.* Missouri Pacific R. Co., 90 Mo. 199; Burrall *v.* Bushwick R. Co., 75 N. Y. 211. In the case of American, etc., Co. *v.* Norris, 43 Fed. R. 711, the court said: "It is the familiar law that a corporation has a personality of its own distinct from that of its stockholders, that it is not affected in the remotest degree by contracts made by its stockholders with third parties, whether they own much or little of its capital stock, and is not bound to discharge any personal obligations assumed by its stockholders." The court cited Pullman, etc., Co. *v.* Missouri Pacific Co., 115 U. S. 587, 6 Sup. Ct. R. 194; Moore, etc., Co. *v.* Towers, etc., Co , 87 Ala. 206, s. c. 6 So. R. 41, 13 Am. St. R. 23; Davis, etc., Co. *v.* Davis, etc., Wagon Co., 20 Fed. R. 699. The court also distinguished the case from that of Beal *v.* Chase, 31 Mich. 490. The case of American, etc., Co. *v.* Taylor Manuf. Co., 46 Fed. R. 152, is the same case as that from which we have quoted and was heard upon an

convey the corporate real estate for the reason that the title is in the corporation,[1] and conveyances must be made by the authorized representatives of the corporation. A conveyance made by all the stockholders may be upheld in equity where facts are alleged and proved sufficient to invoke the assistance of the court of conscience, but the conveyance in and of itself is not effective to carry the title.[2] In various modes the question as to the authority of the stockholders to act for the corporation has been presented and the conclusion generally declared is that it is only in exceptional cases that their acts can be regarded as those of the corporation.[3] A stockholder may, of course, be appointed an agent of the corporation and his acts, within the scope of his authority, will be binding on the corporation, but his authority will be attributable to his appointment and not to his position as a shareholder.[4]

§ 238. **Directors—Generally.**—The principal officers of a private corporation are, as already indicated, the directors. A choice of directors is an essential step in its organization, and in many of the states it is specified that the corporate powers are to be exercised by them.[5] It is competent for the legislature to constitute the board of directors the corporation, and where there is a statute making the directors the corporation, they are necessarily the possessors of the whole corporate power not elsewhere lodged. But, as a rule, directors are elective officers, chosen as the chief representatives of the corporation.

amended bill. See, generally, Hancock *v.* Holbrook, 9 Fed. R. 353; Railroad Co. *v.* Howard, 7 Wall. 392.

[1] Wheelock *v.* Moulton, 15 Vt. 519; Myers *v.* Perigal, 2 DeGex, M. & G. 599; Edwards *v.* Hall, 6 DeGex, M. & G. 74, 92; Baldwin *v.* Canfield, 26 Minn. 43. See, generally, Harris *v.* Muskingum, etc., Co., 4 Blackf. 267; Carothers *v.* Alexander, 74 Texas 309, s. c. 12 S. W. R. 4; Shay *v.* Terolumie, etc., Co., 6 Cal. 73; Smith *v.* Hurd, 12 Metc. (Mass.) 371; Moffat *v.* Winslow, 7 Paige 124; Gillett *v.* Bowen, 23 Fed. R. 625; Whitman *v.* Cox, 26 Me. 335; Langdon *v.* Hillside, etc., Co., 41 Fed. R. 609; Tomlinson *v.* Bricklayers' Union, 87 Ind. 308.

[2] American, etc., Co. *v.* Taylor, etc., Co., 46 Fed. R. 152; Society, etc., *v.* Abbott, 2 Beav. 559.

[3] Gordon *v.* Swan, 43 Cal. 564.

[4] Taylor Priv. Corp. § 187.

[5] Stimson's Am. Stat. (1892), § 8060.

§ 239. **Number of directors.** — The number of directors is fixed by charter or by the law providing for the incorporation of railroads, or is left to be determined by the stockholders within certain limits. Where the number is not fixed by the charter, or the statute under which the company is organized, it may be fixed by the stockholders by appropriate action. Where the number is fixed definitely by the constating articles or articles of association it can not be changed except in the manner provided by law, or by an authorized change or amendment of such articles.[1]

§ 240. **Directors — How chosen — Generally.** — Directors are usually chosen by the stockholders.[2] In the absence of statutory provisions vesting the power elsewhere it properly resides in the stockholders of the company. The members compose the corporation and it is for them to choose their representatives in some authorized or appropriate mode, unless the statute prescribes the mode; but in the event that a mode is prescribed the stockholders can not rightfully pursue any other. As we shall see presently, an immaterial or unsubstantial deviation from the mode prescribed will not vitiate the election.

§ 241. **Eligibility to the office of director.** — Where the act of incorporation requires that, to render a person eligible to the office of director, he shall possess certain prescribed qualifications, he can not be rightfully chosen to the office unless he possesses the required qualifications. In this, as in all other matters, the act under which the company is incorporated constitutes the paramount law.[3] At common law, any person capable of acting as the business agent for another may be a director.[4] Persons under the disability of coverture or in-

[1] Stimson's Am. Stat. (1892), § 8532.

[2] Stimson's Am. Stat., § 8532, citing laws of Connecticut, Vermont, New York, New Jersey, Pennsylvania, Indiana, Illinois, Minnesota, Nebraska, Maryland, West Virginia, North Carolina, Arkansas, Texas, Montana, Utah, Georgia, Alabama, New Mexico, Arizona, Oklahoma.

[3] Horton *v.* Wilder, 48 Kans. 222, s. c. 29 Pac. R. 566; State *v.* Manufacturers', etc., Co., 24 L. R. A. 252, 29 W. L. Bull. 160.

[4] People *v.* Webster, 10 Wend. (N. Y.) 554.

fancy are eligible to the office of director unless the statutory law interdicts the selection of such persons. Non-residents may, in the absence of statutory prohibition, be eligible to the office of director,[1] but if residence is required by the statute a non-resident is ineligible. Where the statute does not make the ownership of stock essential to eligibility to the office of director a person who is not a stockholder may be elected.[2] If the charter or by-laws enacted in accordance with it require that directors shall be stockholders, then the persons chosen must be the owners of stock.[3] It has been held that where one is appointed director by the articles of association he is a *de jure* officer, although he did not at the time of his appointment own the number of shares required by the articles of association.[4] The conclusion reached in the case cited in the note is placed upon the ground that the articles of association only relate to officers appointed in the future.

§ 242. **Ineligibility because of connection with competing lines.**—It is held that a director of one company is incompetent to serve as director of a company having adverse interests,

[1] Commonwealth *v.* Hemingway, 131 Pa. St. 614, s. c. 18 Atl. R. 992. See State *v.* Smith, 15 Or. 98, s. c. 14 Pac. R. 814.

[2] Wight *v.* Springfield, etc., Co., 117 Mass. 226, s. c. 19 Am. R. 412; Spering's Appeal, 71 Pa. St. 11, s. c. 10 Am. R. 684; *In re* St. Lawrence Steamboat Co., 44 N. J. 529; *Ex parte* Stock, 33 L. J. Ch. 731; Kerchner *v.* Gettys, 18 So. Car. 521; *Re* British, etc., Assn., L. R. 5 Ch. Div. 306. See Penobscott, etc., Co. *v.* Dummer, 40 Me. 172, s. c. 63 Am. Dec. 654; Despatch Line *v.* Bellamy, etc., Co., 12 N. H. 265, s. c. 37 Am. Dec. 203; Fey *v.* Peoria, etc., Co., 32 Ill. App. 618; *Re* Corporate Directors, 7 Pa. Co. Ct. R. 178. See, generally, Trisconi *v.* Winship, 43 La. Ann. 45; Beardsley *v.* Johnson, 121 N. Y. 224.

[3] Bartholomew *v.* Bently, 1 Ohio St. 37. It is held that actual beneficial ownership is requisite. Bainbridge *v.* Smith, L. R. 41 Ch. Div. 462, s. c. 33 Am. & Eng. Corp. Cases 172; *Ex parte* Stock, 33 L. J. Ch. 731; Matter of Newcomb, 18 N. Y. Supp. 16. See Cumming *v.* Prescott, 2 Younge & C. Exch. 488; Chemical, etc., Bank *v.* Colwell, 132 N.Y. 250, s. c. 30 N. E. R. 644; Commonwealth *v.* Detwiller, 131 Pa. St. 614; Nathan *v.* Tompkins, 82 Ala. 437; Richards *v.* Attleborough, etc., Bank, 148 Mass. 187, s. c. 19 N. E. R. 353, 1 L. R. A. 781; Hazlehust *v.* Savannah, etc., R. Co. 43 Ga. 13; Matter Argus Printing Co., 1 N. Dak. 434, s. c. 26 Am. St. R. 639; Pulbrook *v.* Richmond, etc., Co., L. R. 9 Ch. Div. 610.

[4] Karuth's Case, L. R. 20 Eq. 506; Portal *v.* Emmens, 1 Com. Pl. Div. 664.

and, if chosen, the court will remove him and replace him by trustees of its own appointing.[1] The decisions to which we refer seem to be supported by sound reason. Directors occupy fiduciary relations to the corporation and they ought not to be interested adversely to the corporation. It has, however, been held that the fact that a stockholder intends, if elected a director, to vote for an arrangement by which another corporation will control the company can not, though such an arrangement be illegal, affect the validity of his election.[2]

§ 243. **Election of ineligible person to office of director.**—It is generally held that the election of an ineligible person to the office of director is voidable only and not absolutely void.[3] If the election is not void, but merely voidable, it would seem to follow that the person chosen is invested with color of office and, ordinarily, is not to be regarded as a mere usurper. He is not, to be sure, an officer *de jure*, but it seems to us that he is to some extent and for some purposes a corporate representative; but there are authorities holding that an ineligible person can not be a *de facto* officer.[4] It is also held that votes cast for an ineligible candidate are "thrown away."[5] For the reasons given and upon the authorities referred to in the next paragraph, we are inclined to the opinion that an ineligible candidate formally elected and inducted into office may be an officer *de facto*.[6]

§ 244. **Officers de facto — Generally.**—Where the rights of third persons are involved an officer may be such *de facto*,

[1] Pearson *v.* Concord R. Co., 62 N. H. 537. In West Virginia a corporation may provide by by-law that no person who is attorney against it in a suit shall be eligible to serve as director. Cross *v.* West Virginia Central, etc., R. Co., 37 W. Va. 342.

[2] Ohio & M. R. Co. *v.* State, 49 Ohio St. 668.

[3] The doctrine goes back to the case of Crawford *v.* Powell, 2 Burr. 1013.

[4] People *v.* Albany, etc., R. Co., 55 Barb. 344; Craw *v.* Easterly, 54 N. Y. 679; Easterly *v.* Barber, 65 N. Y. 252.

[5] Mr. Cook says: "Votes cast for a person not eligible to office can not elect him. He is not even a *de facto* officer and may be ousted by legal proceedings." Cook on Stockholders (3d ed.), 620.

[6] Horton *v.* Wilder, 48 Kan. 222, s. c. 29 Pac. R. 566.

although in strict right he is not eligible to the office and has not been legally elected. It would be a hardship upon third persons who deal with corporations to require them at their peril to determine whether persons acting as corporate officers under color of right are in fact the officers of the corporation. The question is essentially different in cases where third persons are concerned from what it is in cases where the person claiming to be an officer asserts some right by virtue of the office. Where there is color of right under a corporate election and corporate recognition of the acts of the person claiming to be a director, third persons who in good faith act upon the belief that he is an officer are entitled to protection. The same principle which protects persons who deal with persons having color of right to a public office should protect those who deal with representatives of corporations, for it would be unjust to require persons dealing with corporate representatives acting as officers under color of right to investigate and decide whether the claim to office is well founded. The same principle which upholds acts of corporations *de facto* ought to be sufficient to uphold the acts of persons who with color of right assume the functions of corporate officers. We believe the conclusion we have stated to be supported by principle and authority.[1]

[1] Selma, etc., Co. *v.* Tipton, 5 Ala. 787, s. c. 39 Am. Dec. 344; Despatch Line, etc., *v.* Ballamy, 12 N. H. 205; Wallace *v.* Walsh, 125 N. Y. 26; Demarest *v.* Flack, 128 N. Y. 205; Atlantic, etc., Co. *v.* Johnston, 70 N. C. 348; Moses *v.* Tompkins, 84 Ala. 613; Burr *v.* McDonald, 3 Gratt. 215; Cahill *v.* Kalamazoo, etc., Co., 2 Dougl. (Mich.) 124, s. c. 43 Am. Dec. 457; Rockville, etc., *v.* Van Ness, 2 Cranch. C. C. 449; Tucker *v.* Aiken, 7 N. H. 113, 135; Atlas Nat. Bank *v.* Gardner, etc., Co., 8 Biss. 537. *Contra*, *In re* Newcomb, 18 N.Y. Supp. 16. In Beardsley *v.* Johnson, 121 N.Y. 224, 24 N.E. R. 380, it was held that if a person elected to the office of director becomes ineligible and his place is filled by election, he is not even a director *de facto*, and service of process on him is void. There is, as everyone knows, an essential difference between cases where the rights of innocent third persons are involved and cases where the rights of the claimant are asserted by him, and so there is between cases involving rights of third persons and cases where the state assails the right of the claimant to the office. Ebaugh *v.* German, etc., Church, 3 E. D. Smith 60; *In re* County, etc., Co., L. R. 5 Ch. App. 288; People *v.* Albany, etc., Co., 55 Barb. 344. See, generally, Cooper *v.* Curtis, 30 Me. 488; Mechanics', etc., Bank *v.* Burnet, etc., Co., 32 N. J. Eq.

§ 245. **Election of ineligible person—Who may question right to office.**—A private person who has no interest whatever in the affairs of a railroad corporation can not successfully challenge the right of an ineligible person to hold the office to which he was chosen, except in cases where it is otherwise provided by statute. One who actively and knowingly participates in securing an illegal election and the choice of persons not qualified, can not be heard to complain of the result of the election. If the complainant has been guilty of an intentional wrong he is not in a situation to invoke the assistance of the courts.[1]

§ 246. **Directors de facto—Illustrative cases.**—Persons acting as officers although their term of office had expired and they were holding over have been held to be officers *de facto*, but it seems to us that they should be regarded as officers *de jure*.[2] Officers chosen at a day other than that specified are at least officers *de facto*, and there is authority as well as reason for holding them to be officers *de jure* in the just sense of the term.[3] It has been held that a director elected by a minority of the stockholders is a *de facto* director.[4] So an officer elected under an unconstitutional statute has been held to be an officer *de facto*.[5] Officers elected at a meeting held outside of the state have been held to be *de facto* officers.[6] Directors discharging

236; Atlantic, etc., Co. *v.* Johnston, 70 N. C. 348; Charitable Assn. *v.* Baldwin, 1 Metcf. (Mass.) 359.

[1] Wiltz *v.* Peters, 4 La. Ann. 339. Matter of Application of Syracuse, etc., Co., 91 N. Y. 1.

[2] Thorington *v.* Gould, 59 Ala. 461.

[3] In Beardsley *v.* Johnson, 121 N.Y. 224, s. c. 24 N. E. R. 380, the provisions of a statute requiring the corporate election to be held on a designated day were directory, and directors chosen on a day different from that specified were held officers *de jure*.

[4] Delaware, etc., Co. *v.* Pennsylvania, etc., Co., 21 Pa. St. 131. See, also, Baird *v.* Bank of Washington, 11 S. & R. 411.

[5] Leach *v.* People, 122 Ill. 420, s. c. 12 N. E. R. 726. See, generally, Mallett *v.* Uncle Sam, etc., Co., 1 Nev. 188; Plymouth *v.* Painter, 17 Conn. 585; State *v.* Curtis, 9 Nev. 325; Hamlin *v.* Kassafer, 15 Ore. 456, s. c. 15 Pac. R. 778.

[6] Ohio, etc., R. Co. *v.* McPherson, 35 Mo. 13, s. c. 86 Am. Dec. 128, citing Trustees, etc., *v.* Hills, 6 Cow. 23; All Saint's Church *v.* Lovett, 1 Hall (N. Y. S. Ct.) 191; John *v.* Farmers', etc., Bank, 2 Blkf. (Ind.) 367, s. c. 20 Am. Dec. 119; Mining Co. *v.*

the functions of office and holding under color of appointment by the legislature are *de facto* directors.[1] It has been adjudged that directors may be such *de facto* although the corporation was illegally or irregularly organized.[2] We suppose, however, that there can be no officers *de facto*, and, of course, no officers *de jure*, where there is no statute authorizing the organization of the corporation for in such a case there could be no color of right, and color of right is essential to create an officer *de facto*. Mere irregularities in the mode of conducting an election will not, unless very material and substantial, impair the title of the persons chosen as directors, and as to third persons, officers chosen will be *de facto* officers, although there may be many irregularities and errors in conducting the election.

§ 247. **De facto directors—Two boards.**—If there are two boards of directors the question as to whether there can be *de facto* directors is perplexing. If those claiming to be directors have color of title, are not mere usurpers, and have acted as directors for a considerable length of time, we think that as to third persons, acting in good faith and without notice, in the ordinary course of business, they should be regarded as directors *de facto*.[3] The question is, of course, radically different where it arises in a suit or action by innocent third persons from what it is when it arises in a suit or action by one claiming rights as an officer, or in a suit or action by one who actively participates in giving the claimants color of office and

Anglo Californian, etc., Bank, 104 U. S. 192. See Anglo Californian, etc., Bank *v.* Mahoney, etc., Co., 5 Sawy. 255, 258. See, also, Commonwealth *v.* Milton, 12 B. Mon. 222, s. c. 54 Am. Dec. 522; Aspinwall *v.* Ohio, etc., Co., 20 Ind. 329, s. c. 83 Am. Dec. 329; Bradford *v.* Frankfort, etc., R. Co., 142 Ind. 383, 40 N. E. R. 741, 41 Id. 819.

[1] Ellis *v.* North Carolina, etc., 68 N. C. 423. See, generally, Smith *v.* Bank of the State, 18 Ind. 327; Humphreys *v.* Mooney, 5 Colo. 282; Savage *v.* Ball, 17 N. J. Eq. 142; Smith *v.* Erb, 4 Gill. 437; People *v.* Staton, 73 N. C. 546, s. c. 21 Am. R. 479.

[2] Hackensack, etc., Co. *v.* DeKay, 36 N. J. Eq. 548.

[3] Lebanon, etc., Co. *v.* Adair, 85 Ind. 244; Waterman *v.* Chicago, etc., Co., 139 Ill. 658, s. c. 15 L. R. A. 418; Genesee Tp. *v.* McDonald, 98 Pa. St. 444.

seeks to obtain personal benefit through the acts of such persons, for in such cases there is reason for holding that the corporation is not bound by the acts of the claimants of the office.[1]

§ 248. **Holding over—Failure to elect.**—Where officers are elected for a designated term and the stockholders fail to elect at the time fixed for the election, the officers will hold over, unless the statute otherwise provides, and their official acts will bind the corporation.[2] A failure to elect officers at the time prescribed does not work a dissolution, unless the statute expressly or impliedly makes such failure operate as a dissolution.[3] Where the stockholders refuse or neglect to elect officers and corporate affairs are put in jeopardy by such failure, or the rights of property are thereby prejudiced the court may, upon the suit of a party who shows equity, and makes it appear that his rights are in danger of being impaired or destroyed, appoint a receiver to take charge of the affairs of the corporation.[4]

§ 249. **Powers of directors—Source of.**—The statute under which a railroad company is organized is the source of power and the stockholders can not invest the persons chosen as directors with powers not conferred upon the corporation by the charter.[5] The stockholders have authority to select the persons to whom such powers are to be intrusted, but individual stockholders do not stand in the relation of principals.[6]

[1] Hildreth *v.* McIntire, 1 J. J. Marsh. (Ky.) 206, s. c. 19 Am. Dec. 61; Conway *v.* City of St. Louis, 9 Mo. App. 488.

[2] Cassell *v.* Lexington, etc., Co., (Ky.) 9 S. W. R. 701; Thorington *v.* Gould, 59 Ala. 461; Currie *v.* Mutual, etc., Co., 4 Hen. & M. (Va.) 315; Huguenot, etc., Bank *v.* Studwell, 6 Daly (N. Y.) 13; Olcott *v.* Tioga, etc., Co., 27 N. Y. 546; South Bay, etc., Co. *v.* Gray, 30 Me. 547.

[3] Cahill *v.* Kalamazoo, etc., Co., 2 Dougl. (Mich.) 124, s. c. 43 Am. Dec. 457; Philips *v.* Wickham, 1 Paige 590; Knowlton *v.* Ackley, 8 Cush. 93.

[4] Lawrence *v.* Greenwich, etc., Co., 1 Paige 587; Ward *v.* Sea, etc., Co., 7 Paige 294.

[5] It is not necessary that all powers be expressly conferred upon the corporation by the charter for many powers exist by necessary implication.

[6] Bank of Middlebury *v.* Rutland, etc., R. Co., 30 Vt. 159; Dayton, etc., R. Co. *v.* Hatch, 1 Disney (Cin. Sup. Ct.) 84; Wood Hydraulic, etc., Co. *v.*

The corporation, however, does occupy the position of a principal for the directors are its agents or representatives.

§ 250. **Powers of directors—Generally.**—Except so far as their action is controlled by special provisions of the charter, or of by-laws adopted under its authority, the directors may do any act within the general range of the ordinary business of the company which the company itself may do.[1] As elsewhere said, the board of directors is the governing department of the corporation and it is through the board or those acting under it, that ordinary corporate affairs are managed and the usual corporate business transacted. The implied powers of the directors generally have nearly as wide a range as the implied powers of the corporation itself. Comparatively few powers are reserved to the stockholders of railroads in this country. The right to elect the directors, and to pass upon questions of leasing or selling the franchises and property, of increasing or decreasing the capital stock, of consolidating with other corporations,[2] and other matters of a fundamental or organic nature do not, however, properly belong to the directors, for those powers properly belong to the stockholders.[3] The board of directors

King, 45 Ga. 34; Shaw *v.* Norfolk County R. Co., 16 Gray 407; Chetlain *v.* Republic, etc., Ins. Co., 86 Ill. 220.

[1] Bank of Middlebury *v.* Rutland, etc., R. Co., 30 Vt. 159; Wright *v.* Oroville, etc., Co., 40 Cal. 20. Where two railroads in adjoining states are operated together, and additional land and depot buildings are necessary in one of the states to enable them to retain their increased business, the directors of the railroad in the other state have power to contract to pay a proper portion of the cost of these extended business facilities, though, as a general rule, they have no authority to expend money upon buildings outside the states in which their road is located, without the consent of the stockholders. Nashua & L. R. Corp. *v.* Boston & L. R. Corp., 136 U. S. 356, 34 L. Ed. 363, 10 Sup. Ct. R. 1004, 42 Am. & Eng. R. Cas. 688.

[2] Stimson's Am. Stat. (1892), §§ 8453, 8732, 8721, 8722, 8611; Wood's Ry. Law 400. See Dayton, etc., R. Co. *v.* Hatch, 1 Dis. (Cin. Super. Ct.) 84. The stockholders and not the directors are the proper parties to increase the capital stock where no provision is made as to how it is to be done. *In re* Wheeler, 2 Abb. Pr. (N. Y.) N. S. 361. Or to agree to an amendment of the charter. Witter *v.* Mississippi, etc., R. Co., 20 Ark. 463.

[3] Organic or fundamental changes in the corporate body, its organization or object can not be made by the directors except where the charter authorizes the directors to make such changes. There is an important distinction between conducting and man-

is the proper agency to make ordinary corporate contracts. Its power in this respect is very broad and comprehensive. The board, unless so required by statute, is not bound to make all contracts itself, but may in most instances empower officers or agents to make ordinary business contracts. Contracts entered into by the board of directors will always be binding upon the company, where the contracts are within the scope of the corporate powers, and are made in pursuance of some object embraced by the charter.[1] The rule stated is a general one of wide sweep, but, wide as the rule is, it is always to be understood that the power to contract, its extent and limitations, must be ascertained from the act of incorporation. The action of the board of directors in making contracts can not be controlled even by a majority of the stockholders, where the power to contract is conferred upon the board by the act of incorporation[2] and where they act in good faith, that is, the action can not be controlled directly. It may, however, often be controlled indirectly by voting the directors out of office, in a legal mode. Where the rights of third persons have intervened the stockholders can not annul the action of the directors, unless they have violated the provisions of the charter or transcended their authority; and not always, even in such cases, for there may be conduct or acts constituting an estoppel which will preclude the stockholders from successfully assailing the action of their representatives. The authority and discretion of the directors, being intrusted to them by the effective agree-

aging general corporate affairs and making changes of the nature of those mentioned.

[1] Bank of Middlebury *v.* Rutland, etc., R. Co., 30 Vt. 159; Dayton, etc., R. Co. *v.* Hatch, 1 Dis. (Cin. Sup. Ct.) 84; Record *v.* Central Pac. Co., 15 Nev. 167; Fackiner *v.* Grand Junction R. Co., 4 Ont. R. Ch. Div. 350; Hodder *v.* Kentucky, etc., R. Co., 7 Fed. R. 793; Union Mut. Ins. Co. *v.* Keyser, 32 N. H. 313; Cicotte *v.* Anciaux, 53 Mich. 227; Protection L. Ins. Co. *v.* Foote, 79 Ill. 361.

[2] Wardell *v.* Union Pac. R. Co., 103 U. S. 651; Flagg *v.* Manhattan R. Co., 20 Blatchf. (U. S.) 142. Directors do not exceed their powers by making an agreement, with apparently good reasons and in good faith, to reduce the amount of money payable under a lease of their corporation, especially if nearly nine-tenths of the stockholders have acquiesced. Beveridge *v.* New York El. R. Co., 112 N. Y. 1, 2 L. R. A. 648.

ment of all the stockholders expressed in the charter or articles of association, can be controlled by the majority or by any other agent in comparatively very few cases.[1]

§ 251. **Powers of directors—Illustrative cases.**—Where two railway corporations of different states whose lines connected entered into an agreement to operate and manage their road as one system, it was held that the directors of one company were authorized without the previous approval of the stockholders to pay for the construction of a passenger station in the state foreign to that in which it was created, and into which its line did not extend where it appeared that the construction of the passenger station was for the purpose of enabling the joint management to retain and extend its increasing business.[2] Directors have power to fix and provide for the payment of the salaries of the officers of the company;[3] and to pay part of the corporate indebtedness in stock of the company.[4] They have authority to compensate one of their number for services rendered the company not within the line of his duties as director;[5] and to issue bonds to pay debts contracted for constructing and completing the road and to mortgage the corporate property to secure the payment of the same.[6] The

[1] Morawetz Priv. Corp. (2d ed.), § 511; Karnes *v.* Rochester, etc., R. Co., 4 Abb. Pr. N. S. (N. Y.) 107; Belfast, etc., R. Co. *v.* Belfast, 77 Me. 445; Sims *v.* Street R. Co., 37 Ohio St. 556; Elkins *v.* Camden, etc., R. Co., 36 N. J. Eq. 241; Bardstown, etc., Turnp. Co. *v.* Rodman, (Ky.) 13 S. W. 917; Banet *v.* Alton, etc., R. Co., 13 Ill. 504; Oglesby *v.* Attrill, 105 U. S. 605. But if they act in matters where their private interests are concerned any stockholder may have their action set aside. Hedges *v.* Paquett, 3 Oreg. 77. A tripartite agreement between three corporations having been adjudged void as to one, the directors of the other companies may, in their honest discretion, bring action to sever the contractual relations. Beveridge *v.* New York Elevated R. Co., 112 N. Y. 1, 2 L. R. A. 648, 19 N. E. 489.

[2] Nashua, etc., Co. *v.* Boston, etc., Co., 136 U. S. 356, s. c. 10 Sup. Ct. R. 1004.

[3] St. Louis, etc., Co. *v.* Tiernan, 37 Kan. 606, s. c. 40 Am. & Eng. R. Cas. 525; Falkiner *v.* Grand Junction, etc., Co., 4 Ont. R. Ch. Div. 350, s. c. 16 Am. & Eng. R. R. Cas. 591.

[4] County Court *v.* Baltimore, etc., Co., 35 Fed. Rep. 161.

[5] Ten Eyck *v.* Pontiac, etc., Co., 74 Mich. 226, s. c. 37 Am. & Eng. R. Cas. 273.

[6] McLane *v.* Placerville, etc., Co., 66 Cal. 606, s. c. 26 Am. & Eng. R. Cas. 404.

directors of a railroad company have no authority, implied or general, to appropriate its bonds to aid in the construction of the line of another corporation.[1] Nor have they power to postpone the time of an annual election of officers, so as to continue themselves in office.[2] Directors have power to borrow money to conduct the business of the corporation, and, ordinarily, they may pledge its personal property or mortgage its real estate to secure money borrowed for corporate purposes.[3] They have power, except where the law otherwise provides, to make contracts for the transportation of property,[4] and, as it has been held, to make a contract with another company to divide the earnings of the two companies.[5] It has been held that directors have no authority to organize a second company in another state and impose the expense upon the home company.[6] It has been adjudged that where the directors and shareholders are not identical, the directors have no authority to bind the corporation by an agreement with a designated person that he shall be a director.[7] Unless authority is granted by the act of incorporation to the board of directors to invest corporate funds in the stock of other corporations, the board has no power to make such an investment.[8]

[1] Starbuck *v.* Mercantile Trust Co., 9 Ry. & Corp. L. J. 203.

[2] Elkins *v.* C. & A. R. R. Co., 36 N. J. Eq. 467.

[3] Ridgway *v.* Farmers' Bank, 12 S. & R. 256; Davis *v.* Flagstaff, etc., Co., 2 Utah 74; Wood *v.* Wheelan, 93 Ill. 153; Burrell *v.* Nahant Bank, 2 Metc. (Mass.) 163; Hendee *v.* Pinkerton, 14 Allen 381; Sultmarsh *v.* Spaulding, 147 Mass. 224; Tupp *v.* Swanzey, etc., Co., 3 Pick. 291; Hopson *v.* Ætna, etc., Co., 50 Conn. 597; Taylor *v.* Agricultural, etc., Co., 68 Ala. 229. See, generally, *In re* West of England Bank, L. R. 14 Ch. Div. 317; Bank of South Australia *v.* Abrahams, L. R. 6 P.C. 265; Flagg *v.* Manhattan, etc., Co., 10 Fed. Rep. 413; Hoyt *v.* Thompson's Ex'r, 19 N. Y. 207, 216; McCullough *v.* Moss, 5 Denio 567, 575; Sheffield, etc., Co. *v.* Unwin, L. R. 2 Q. B. Div. 214; Chamberlain *v.* Bromberg, 83 Ala. 576; Descombes *v.* Wood, 91 Mo. 196; Union Bank *v.* Ellicott, 6 G. & J. 363; Sheldon, etc., Co. *v.* Eickemeyer, etc., Co., 90 N. Y. 607; Duncomb *v.* New York, etc., Co., 88 N. Y. 1.

[4] Railroad Co. *v.* Furnace Co., 37 Ohio St. 434.

[5] Elkins *v.* Camden, etc., Co., 36 N. J. Eq. 241.

[6] Eakins *v.* American White Bronze Co., 75 Mich. 568.

[7] Seymour *v.* Detroit Rolling Mills, 56 Mich. 117.

[8] Joint Stock, etc., Co. *v.* Brown, Law R. 8 Eq. Cases 381; Commercial, etc., Co. *v.* Board, etc., 90 Ala. 1,

There are exceptions to this general rule, but they are very rare. Stock of other corporations may be acquired as a security for, or in payment of, a debt; for a railway company, unless its charter otherwise provides, is entitled to secure payment of claims owing to it, in the same manner as may be done by other business corporations, or by natural persons.[1] The directors of a corporation invested with authority to dispose of corporate funds may, as it has been held, accept stock of other corporations in payment,[2] but we regard the doctrine asserted by the cases referred to as one to be very cautiously received and very carefully applied. Where the statute authorizes the consolidation of railway corporations, and the purchase of the stock of the one company by the other, and a consolidation is rightfully effected, the purchase of stock may be made by the board.[3]

§ 252. **Directors—Powers of—Organic changes.**—Directors have no general authority to make any fundamental changes in the purposes and objects of the corporation,[4] nor to accept

s. c. 42 Am. St. R. 1; Bank *v.* Hart, 37 Neb. 197, s. c. 40 Am. St. R. 479; Denny, etc., Co. *v.* Schram, 6 Wash. 134, s. c. 36 Am. St. R. 130; Valley, etc., Co. *v.* Lake Erie, etc., Co., 46 Ohio St. 44; Central R. Co. *v.* Pennsylvania R. Co., 31 N. J. Eq. 475; Franklin, etc., Co. *v.* Lewiston, etc., 68 Me. 43, s. c. 28 Am. R. 9; Mechanics', etc., Co. *v.* Meridean, etc., Co., 24 Conn. 159; Sumner *v.* Marcy, 3 Woodb. & M. 105; Central R. Co. *v.* Collins, 40 Ga. 582; Hazlehurst *v.* Savannah, etc., R. Co., 43 Ga. 13, 58; People *v.* Chicago, etc., Co., 130 Ill. 268, s. c. 17 Am. St. R. 319; Memphis, etc., R. Co. *v.* Woods, 88 Ala. 630, s. c. 16 Am. St. R. 81; Easun *v.* Buckeye, etc., Co., 51 Fed. R. 156; Mackintosh *v.* Flint, etc., R. Co., 34 Fed. R. 582; Pearson *v.* Concord R. Co., 62 N. H. 537, s. c. 13 Am. St. R. 590.

[1] Memphis, etc., R. Co. *v.* Woods, 88 Ala. 630, s. c. 16 Am. St. R. 81. See, generally, National Bank *v.* Case, 99 U. S. 628; County Court, etc., *v.* Baltimore, etc., R. Co., 35 Fed. R. 161; Holmes, etc., Co. *v.* Holmes, etc., Co., 127 N. Y. 252, s. c. 24 Am. St. R. 448.

[2] Treadwell *v.* Salisbury, etc., Co., 7 Gray 393, s. c. 66 Am. Dec. 490; Hodges *v.* New England, etc., Co., 1 R. I. 312, s. c. 53 Am. Dec. 624.

[3] Atchison, etc., R. Co. *v.* Fletcher, 35 Kans. 236; State *v.* Atchison, etc., R. Co., 24 Neb. 143, s. c. 8 Am. St. R. 164; Atchison, etc., R. Co. *v.* Cochran, 43 Kan. 225, s. c. 19 Am. St. R. 129; Ryan *v.* Leavenworth, etc., Co., 21 Kans. 365; Hill *v.* Nisbet, 100 Ind. 341.

[4] Witter *v.* Mississippi, etc., R. Co., 20 Ark. 463; Railway Co. *v.* Allerton, 18 Wall. (U. S.) 233; Fry *v.* Lexington, etc., R. Co., 2 Met. (Ky.) 314;

an amendment to the charter making such changes,[1] unless, perhaps, where such power is clearly lodged in them by the charter.[2] It has, however, been held that the power to accept amendments is lodged with the directors when it is given in general terms to the corporation, and the directors are intrusted with all of the corporate powers.[3] But we suppose that the doctrine of the case referred to can only apply where the statute impliedly or expressly vests the board with power to accept amendments, for that power properly resides in the stockholders. When the amendment is immaterial and does not work a fundamental change impairing the rights of the stockholders, or, possibly, where the legislature has reserved the right to amend, the

Commonwealth *v.* Cullen, 13 Pa. St. 133; Atlantic, etc., R. Co. *v.* St. Louis, 66 Mo. 228; Goodin *v.* Evans, 18 Ohio St. 150; Joy *v.* Jackson, etc., Plank Road Co., 11 Mich. 155; Black *v.* Delaware and R. Canal Co., 22 N. J. Eq. 130; Durfee *v.* Old Colony R. Co., 5 Allen (Mass.) 230; Baker's Appeal, 109 Pa. St. 461; Marlborough, etc., Co. *v.* Smith, 2 Conn. 579; Hope, etc., Co. *v.* Beckmann, 47 Mo. 93; Mississippi, etc., R. Co. *v.* Gaster, 24 Ark. 96; Venner *v.* Atchison, etc., Co., 28 Fed. R. 581; *In re* Era, etc., Co., 30 L. J. Eq. 137; Blatchford *v.* Ross, 5 Abb. Pr. R. (N. S.) 434; Starbuck *v.* Mercantile Trust Co., 9 Corp. & Ry. L. J. 203; Elkens *v.* Camden, etc., R. Co., 36 N. J. Eq. 233.

[1] Mobile, etc., Co. *v.* Steiner, 61 Ala. 559; Baker's Appeal, 109 Pa. St. 461; Commonwealth *v.* Cullen, 13 Pa. St. 133; Brown *v.* Fairmount, etc., Co., 10 Phila. 32; Marlborough, etc., Co. *v.* Smith, 2 Conn. 579; Hope, etc., Co. *v.* Beckmann, 47 Mo. 93; Mississippi, etc., R. Co. *v.* Gaster, 24 Ark. 96.

[2] In Dayton, etc., R. Co. *v.* Hatch, 1 Disney (Cin. Super. Ct.) 84, the court said "That both the special charter of the plaintiff and the general railroad law contemplated that all corporate acts, including an assent to such an amendment as the one authorized, should be done by the board of directors, appears to be clear." In the note which follows we have ventured to question the soundness of the decision in the case, here cited. Our judgment is that amendments, which are fundamental in their nature, must be accepted by all the stockholders except in cases where the statute expressly vests the whole corporate power in the directors or provides that amendments may be accepted by them. Buffalo, etc., R. Co. *v.* Dudley, 14 N. Y. 336; Kenosha, etc., R. Co. *v.* Marsh, 17 Wis. 13; Sprigg *v.* Western Tel. Co., 46 Md. 67; Venner *v.* Atchison, etc., Co., 28 Fed. R. 581.

[3] Dayton, etc., R. Co. *v.* Hatch, 1 Disney (Cin. Super. Ct.) 84. We think that the doctrine of the case cited is broader than principle or authority will justify; at all events, some of the expressions in the opinion require qualification and limitation. The doctrine laid down in Railway Co. *v.* Allerton, 18 Wall. 233, is the true one in our judgment.

directors may act upon the amendment.[1] If the legislature has reserved the power to amend, then an immaterial amendment can not be justly said to impair the rights of stockholders, but it would be otherwise if the amendment were a material one and power to amend were not reserved.[2] Directors, although intrusted with extensive powers in the management of the corporation business, have, ordinarily, no authority to apply to the legislature for an enlargement of the corporate powers nor to accept a grant of such powers made upon their application.[3] Directors can not, in the absence of any provisions of the charter giving them power, increase the capital stock,[4] since this is a change of a fundamental character, which, by introducing additional votes into the corporate body, would change the relative influence, control and profit of each member, and have the effect of making the stockholders members of a company in which they never consented to become members. Nor can they dispose of the company's property which is necessary to the transaction of its business, and wind up its affairs without special authority from the stockholders.[5] The rule just stated as to the disposition of property is a general one, but is not without exceptions. There may be cases, as for instance, where it is necessary to preserve corporate property and interests by an assignment, in which the directors may dispose of corporate property. The general rule is that the authority conferred upon the directors is granted them in order that they may carry forward the purposes for which the corporation

[1] New Haven, etc., R. Co. *v.* Chapman, 38 Conn. 56; Pacific R. Co. *v.* Hughes, 22 Mo. 291; Bedford R. Co. *v.* Bowser, 48 Pa. St. 29; Delaware, etc., R. Co. *v.* Irick, 23 N. J. L. 321; Bailey *v.* Hollister, 26 N. Y. 112.

[2] See *ante*, § 45.

[3] Marlborough Mfg. Co. *v.* Smith, 2 Conn. 579. Any such action on their part would not bind the stockholders. Snook *v.* Georgia Imp. Co., 83 Ga. 61. See to the effect that the directors can not bind the stockholders by their acceptance of an amendment to the charter, where the legislature had not reserved the power to amend. Witter *v.* Mississippi, etc., R. Co., 20 Ark. 463; Commonwealth *v.* Cullen, 13 Pa. St. 133. See *ante*, § 45.

[4] Eidman *v.* Bowman, 58 Ill. 444. *In re* Wheeler, 2 Abb. Pr. (N. Y.) N. S. 361. See Durfee *v.* Old Colony R. Co., 5 Allen (Mass.) 230; Atlantic, etc., R. Co. *v.* St. Louis, 66 Mo. 228.

[5] Rollins *v.* Clay, 33 Me. 132; Abbot *v.* American Hard Rubber Co., 33 Barb. (N. Y.) 578.

was organized, and not that they may terminate its existence.[1] Where no special authority[2] to do so is contained in the charter, the directors of a railroad company can not execute a lease of the company's property without being directed by a regularly called meeting of the stockholders to do so.[3]

§ 253. **Directors—Extent of authority—Generally.**—The authority of the board of directors extends to contracting debts and pledging or conveying real or personal property in payment or as security.[4] It is held that the board may make an assignment of the property of the corporation for the benefit of its creditors, without the express authority or consent of the stockholders,[5] if it acts in good faith. The directors can, of course, only bind the corporation as to corporate matters and by acts within the scope of the powers conferred upon the company.[6]

§ 254. **Powers of directors—General conclusion.**—It may be safely affirmed that the general rule is that all the ordinary affairs and business of a railway company are under the control and management of the board of directors and that in conducting that business and managing those affairs the board of directors

[1] Bank Commrs. *v.* Bank of Brest, 1 Harr. Ch. (Mich.) 106.

[2] Under this general doctrine it is held that authority to manage the business does not include power to lease the road. Metropolitan El. R. Co. *v.* Manhattan El. R. Co., 11 Daly (N. Y.) 373, where it is held that the directors could not lease the road, although the corporation was specially empowered to do so.

[3] Martin *v.* Continental Pass. R. Co., 14 Phila. (Pa.) 10, holding this to be true where the directors hold a majority of the stock. But where the directors owned all the stock, it was said that there was no one in a situation to complain. Barr *v.* New York, etc., R. Co., 96 N. Y. 444.

[4] Miller *v.* Rutland, etc., R. Co., 36 Vt. 452; Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205. Unless specially prohibited the directors may mortgage the corporate property to secure a debt which they may create. County Court of Taylor Co. *v.* Baltimore, etc., R. Co., 35 Fed. R. 161; Reichwald *v.* Commercial Hotel Co., 106 Ill. 439; Ellis *v.* Boston, etc., R. Co., 107 Mass. 1.

[5] DeCamp *v.* Alward, 52 Ind. 468; Dana *v.* Bank of U. S., 5 Watts & Serg. 223. Of course it could only do so where the corporation itself is not prohibited from making such an assignment. Dana *v.* Bank of U. S., 5 Watts & Serg. 223.

[6] Ricord *v.* Central Pac. R. Co., 15 Nev. 167.

is in effect the corporation, but is not the corporation so far as concerns matters beyond the ordinary corporate business and affairs. The difficulty is in determining what shall be considered as the ordinary affairs and business of the corporation.[1] It is evident, from the authorities to which we have referred, that a change of the scheme of the corporate organization, or of the nature of the corporate business or objects, is not within the meaning of the cases which hold that the ordinary affairs and business of the corporation are to be managed and controlled by the board of directors. The shareholders can not manage or control the ordinary corporate affairs, for the power over those affairs being vested in the board of directors necessarily excludes the shareholders. But the shareholders, although excluded from the management and control of ordinary corporate matters, do control all matters of a fundamental or organic nature.

§ 255. **Directors — Official action — Preliminary.** — In discharging the duties and exercising the functions imposed by law upon the directors as the governing officers of the corporation they should act as a body, duly convened in session as an official board. What may be called governmental powers can not be delegated, and powers that can not be delegated must be exercised by the board of directors acting as a body. Individual and separate action is not official action. These governmental powers are in their nature legislative or judicial and require for their proper and rightful exercise deliberation and discussion. It is necessary, therefore, that such powers should be exercised by the board of directors so that there may be a comparison of views and an exercise of judgment and discretion by all the members of the board.

§ 256. **Directors—Official action.**—Directors should act together as a board, and, upon principle, action by them separately is not valid or effective. A corporate act required

[1] Hoyt *v.* Thompson, etc., 19 N. Y. 207, 217; Bathe *v.* Decatur, etc., Co., 73 Iowa 11. The first of these cases goes too far.

to be performed by the directors is not effectively performed unless the directors convene as a body in obedience to the requirements of the charter or in accordance with the provisions of a by-law enacted under authority conferred by the charter or act of incorporation. Separate action of a majority of the directors is not the action of the board of directors. The members of the board, when acting together, are the authorized governing officers of the company, but the members acting separately are not.[1] The rule just stated applies although a majority of the directors may separately assent to a given measure or contract.[2]

§ 257. **Directors—Delegation of authority.**—The directors can not rightfully delegate to other corporate officers or agents powers which the law requires them to exercise.[3] The directors may appoint agents to perform duties of a ministerial and executive character, but it does not follow from this that they can entrust to others the duties imposed upon them by law. There is an essential difference between appointing agents to perform duties not required of the board of directors, and assuming to delegate to others, authority vested in the directors as the governing board of the corporation. In many instances duties may be delegated to other agents or officers, but duties of a judicial or legislative nature which the law requires the directors to perform as a body, can not be delegated. There are, no

[1] Filon *v.* Miller, etc., Co., 15 N. Y. Supp. 57; Bank of Healdsburg *v.* Bailhache, 65 Cal. 327; Kupfer *v.* South Parish, 12 Mass. 185; Browning *v.* Hinkle, 48 Minn. 544, s. c. 31 Am. St. R. 691, 51 N. W. R. 605; Lockwood *v.* Thunder, etc., Co., 42 Mich. 536; Deaderich *v.* Wilson, 8 Baxt. (Tenn.) 108; Allemong *v.* Simmons, 124 Ind. 199, s. c. 23 N. W. R. 768; Harris *v.* Muskingum, etc., Co., 4 Blackf. 267; Gashwiler *v.* Willis, 33 Colo. 11; Tileston *v.* Newell, 13 Mass. 406; Roberts *v.* Button, 14 Vt. 195; Barcus *v.* Hannibal, etc., Co., 26 Mo. 102.

[2] Butler *v.* Cornwall, etc., Co., 22 Conn. 335; D'Arcy *v.* Tamar, etc., Co., 4 Hurls. & Colt. 463; Bosanquet *v.* Shortridge, 4 Exch. 699; Cannon River, etc., Co. *v.* Rogers, 51 Minn. 388.

[3] There is conflict in the adjudged cases as to what powers are incapable of delegation and some of the cases go very far in restricting the right to delegate while others go to the extreme in the other direction.

doubt, duties that may be performed through the medium of committees. The board may appoint a committee of its number to discharge certain duties, such as auditing the accounts of the financial officers, or arranging the terms of a lease or mortgage, but the acts of the committee must be passed upon, or in some method adopted or ratified, by the board to make them binding on the corporation.[1] In other words, the action of the committee must in some appropriate mode be made that of the board of directors, either by precedent authority or subsequent ratification.[2] Some cases hold that ministerial or executive acts, the performance of which may be delegated, may be authorized or ratified by the assent of a majority of the board given separately, especially, if that has been the usage.[3] And it is also held that the concurrent action of a majority of the directors is sufficient in such a case,[4] without the formality

[1] Waite *v.* Windham Co. Mining Co., 36 Vt. 18.

[2] Berks, etc., Road *v.* Myers, 6 Sergt. & R. 12, s. c. 9 Am. Dec. 402; Sheridan Electric Light Co. *v.* Ghatham, etc., Bank, 127 N. Y. 517, s. c. 28 N. E. R. 467; Union, etc., Co. *v.* Chicago, etc., Co., 51 Fed. R. 309; Tippets *v.* Walker, 4 Mass. 595. Power to appoint a committee and to invest them with authority to contract may be conferred upon the board of directors by the act of incorporation. In Chicago *v.* Union, etc., Co., 47 Fed. R. 15, 17, the court said: "Summing up this question, the instrument was signed and attested by the proper officers. It was approved by the executive committee, which executive committee was granted *ad interim* by the board of directors all the powers of that board; authority to make such delegation of power was given to the board by the by-laws. Power to make such by-laws was bestowed by the act of incorporation upon the stockholders. At the regular meeting the contract was approved by all the stockholders present. Under these circumstances if the contract was one which the corporation could make it was fully authorized and duly executed and binding."

[3] Bee *v.* San Francisco, etc., R. Co., 46 Cal. 248; Foot *v.* Rutland, etc., R. Co., 32 Vt. 633. See Rogers *v.* Hastings, 22 Minn. 25, where the corporation was held liable to compensate an agent employed by the directors without formal action by the board. See, also, Tenney *v.* East Warren Lumber Co., 43 N. H. 343, where it was held sufficient proof of the concurrence of the board, to show that they assented separately.

[4] Despatch Line, etc., *v.* Bellamy Mfg. Co., 12 N. H. 205; Edgerly *v.* Emerson, 23 N. H. 555; Dey *v.* Jersey City, 19 N. J. Eq. 412; Stoystown, etc., Turnp. Co. *v.* Craver, 45 Pa. St. 386; Ross *v.* Crockett, 14 La. Ann. 811; Yellow Jacket Min. Co. *v.* Stevenson, 5 Nev. 224. See Lyndeborough Glass Co. *v.* Massachusetts Glass Co., 111 Mass. 315, where the superintendent acted with the knowledge of all of

of a meeting, but it is held that the action should, in such case, be taken by them as directors, and not in some other capacity, and that it should clearly appear that a majority of the board consented.[1] It is to be said that some of the cases trench upon the rule forbidding the delegation of authority as well as upon the rule requiring the directors to act as a board, and so far as they do run counter to these rules they are of doubtful soundness.

§ 258. **Directors—Delegation of authority—Illustrative cases.**—It is generally held that the directors can not delegate the authority to make assessments, but it is also held that they may ratify an assessment made without adequate authority by an agent.[2] Some of the cases hold that the power to execute mortgages and leases of corporate property can not be delegated, but on this point the authorities are in conflict.[3] Our opinion is that as to property not required to enable the corporation to exercise its corporate functions and discharge its duties to the public, the board of directors has power to delegate the authority to sell or lease. The board of directors may effectively authorize corporate officers or agents to sell and assign notes, bonds or other securities, belonging to the corporation.[4]

the directors except one in making a purchase, and that one learned of the superintendent's act soon afterward, but no action repudiating the purchase was ever taken. In a suit to recover the purchase price, the court held that the purchase was authorized by the company. Directors holding a majority of the stock have power to agree that an individual may have the full amount that he can collect of a claim against a third person. Delaware City, S. & P. S. Nav. Co. *v.* Reybold, 8 Houst. (Del.) 203, 14 Atl. 847.

[1] Junction R. Co. *v.* Reeve, 15 Ind. 236.

[2] *Ante*, § 175; *Ex parte* Winsor, 3 Story 411; Silver Hook Road *v.* Greene, 12 R. I. 164.

[3] Female, etc., Asylum *v.* Johnson, 43 Me. 180; Gillis *v.* Bailey, 21 N. H. 149; Burrill *v.* Nahant Bank, 2 Metcf. (Mass.) 163, s. c. 35 Am. Dec. 395; *Re* Leeds, etc., Co., 1 L. R. Ch. App. 561; Emerson *v.* Providence, etc., Co., 12 Mass. 237, s. c. 7 Am. Dec. 66; Manchester, etc., R. Co. *v.* Fisk, 33 N. H. 297; Lyon *v.* Jerome, 26 Wend. 485, s. c. 37 Am. Dec. 271; Dana *v.* Bank of United States, 5 Watts & S. 233; Whitney *v.* Union, etc., Co., 65 N. Y. 576.

[4] Fleckner *v.* Bank of United States, 8 Wheat. 338; Ridgway *v.* Farmers' Bank, 12 Sergt. & R. 256, s. c. 14 Am. Dec. 681; Northampton Bank *v.* Pepoon, 11 Mass. 288; Stevens *v.* Hill, 29 Me. 133.

§ 259. **Directors—Action where the mode is prescribed.**—If the statute prescribes the formalities to be observed by the directors in doing a given act, they must comply therewith, or their act may be voidable.[1] This rule applies to cases where observance of the formalities is expressly declared by statute to be a necessary condition precedent,[2] and to all cases in which the effect of the act will be to destroy pre-existing rights,[3] or to impose burdens upon persons whose willingness to assume them depends on their assent to such formalities.[4] In such cases, all persons are bound at their peril to know whether the formalities have been observed or not. But with regard to formalities which are merely directory, a different rule is established. A substantial compliance in such a case is sufficient, and where the material formalities have been observed, a failure to comply with those which are not material will not invalidate the acts, at least as to innocent parties.[5] The failure to observe a formality can not be set up by one who is bound to see to its observance, against those who have no knowledge of such failure,[6] unless they bore such a relation to the company that they knew or were bound to know that such formality was necessary and had the means of ascertaining whether it had been observed.[7] If the directors have general

[1] Leominster Canal Co. *v.* Shrewsbury, etc., R. Co., 3 K. & J. 654; Leavensworth R. Co. *v.* County Court, 42 Mo. 171; Pittsburgh, etc., R. Co. *v.* Clarke, 29 Pa. St. 146.

[2] Leominster Canal Co. *v.* Shrewsbury, etc., R. Co., 3 K. & J. 654; Homersham *v.* Wolverhampton Water Works, 6 Exchq. 137.

[3] As where shares are forfeited for non-payment. Portland, etc., R. Co. *v.* Graham, 52 Mass. (11 Metc.) 1; Lewey's Island R. Co. *v.* Bolton, 48 Me. 451; Garden Gully, etc., Co. *v.* McLister, L. R. 1 App. Cases 39.

[4] As where the corporation is authorized to incumber or transfer its property, if the stockholders vote to do so, or where aid may be levied by municipal corporations if the taxpayers so vote. Town of Eagle *v.* Kohn, 84 Ill. 292; Town of Concord *v.* Portsmouth Savings Bank, 92 U. S. 625; Leavensworth R. Co. *v.* County Court, 42 Mo. 171.

[5] Mott *v.* United States Ins. Co., 19 Barb. (N. Y.) 568; Town of Venice *v.* Murdock, 92 U. S. 494; Lane *v.* Schomp, 20 N. J. Eq. 82; Bissell *v.* Michigan, etc., R. Co., 22 N. Y. 258.

[6] *In re* New Castle, etc., Marine Ins. Co., 19 Beav. 97; Galveston R. Co. *v.* Cowdrey, 11 Wall. (U. S.) 459.

[7] Jackson Ins. Co. *v.* Cross, 9 Heisk. (Tenn.) 283; *In re* European R. Co. L. R. 8 Eq. 444; Mott *v.* United States Trust Co., 19 Barb. (N. Y.) 568.

authority to do an act, all persons dealing with them in reference to such act may assume that it was regularly done, and that all necessary formalities were observed,[1] unless something appears on the face of the transaction to suggest inquiry.[2] Thus a railroad corporation can not dispute the validity of a mortgage given to secure its bonds that are owned by *bona fide* holders upon the ground that its directors authorized its execution at a meeting held outside of the state.[3] Nor can a corporation dispute the validity of acts authorized by its directors at a special meeting, upon the ground that proper notice of such special meeting was not given, where no objection to their validity was made by any director or stockholder until after the rights of innocent third parties had intervened.[4] When the mode of action and formalities to be observed are prescribed by the by-laws, even more liberal rules obtain in determining the rights of persons claiming by virtue of the acts of the directors. Such rule may be varied by usage,[5] at least where the by-laws are made by the directors.[6] And persons dealing with the corporation will not be held to so strict a knowledge of limitations and restrictions upon the general authority of the directors contained in the by-laws as of those contained in public statutes.[7] The observance of required formalities may be waived, and the corporation may become bound by acquiescence in informal acts,[8] except where the charter or public statutes make the observance of the formalities a condition precedent to the directors' authority to act.[9]

[1] Conn. Mut. Life Ins. Co. *v.* Cleveland, etc., R. Co., 41 Barb. (N. Y.) 9. See, also, Bissell *v.* Michigan, etc., R. Co., 22 N. Y. 258; Zabriskie *v.* Cleveland, etc., R. Co., 23 How. (U. S.) 381; Royal British Bank *v.* Turquand, 6 E. & B. 327.

[2] *Ex parte* Eagle Ins. Co., 4 K. & J. 549.

[3] Galveston, etc., R. Co. *v.* Cowdrey, 11 Wall. (U. S.) 459.

[4] Samuel *v.* Holladay, 1 Woolw. (U. S.) 400.

[5] Pittsburgh, etc., R. Co. *v.* Clarke, 29 Pa. 146.

[6] Samuel *v.* Holladay, 1 Woolw. (U. S.) 400. And a formality declared to be imperative may be so long and so universally disregarded as to cease to be operative. *Ex parte* Walton, 26 L. J., Ch. 545.

[7] Bissell *v.* Michigan Southern R. Co., 22 N. Y. 258.

[8] Zabriskie *v.* Cleveland, etc., R. Co., 23 How. (U. S.) 381; Bargate *v.* Shortridge, 5 H. L. Cas. 297; *Ex parte* Walton, 26 L. J. Ch. 545.

[9] *Ex parte* Walton, 26 L. J. Ch. 545; Pittsburgh, etc., R. Co. *v.* Clarke, 29 Pa. St. 146.

§ 260. **Directors—Meetings.**—The official action of directors is taken in regular or special meetings convened in accordance with the provisions of the charter or by-laws. Strictly speaking the functions of directors can only be exercised at such meetings. The rule is that the directors can exercise the powers specially intrusted to them only as a board convened in regular session as a board.[1] Thus, where the directors took part in a stockholders' meeting, at which the body of the stockholders executed a lease, the action was held void as beyond the powers of the stockholders, and the court said: "It is no answer, that individual stockholders who were present at the meeting when the lease was ordered, were also directors. They did not meet or act as directors, but as stockholders."[2] A majority of those present at a regularly convened meeting may act for the corporation,[3] but in order to constitute a regular meeting it is necessary that a quorum be present. In the absence of any special regulations,[4] a majority of the board is necessary to constitute a quorum.[5]

[1] Johnston *v.* Jones, 23 N. J. Eq. 216; Schackelford *v.* New Orleans, etc., R. Co., 37 Miss. 202; Junction R. Co. *v.* Reeve, 15 Ind. 236; Stoystown, etc., Turnp. R. Co. *v.* Craver, 45 Pa. St. 386; Buttrick *v.* Nashua, etc., R.Co., 62 N.H. 413; King *v.* Great Marlow, 2 East. 244; Yellow Jacket Min. Co. *v.* Stevenson, 5 Nev. 224; Green *v.* Miller, 6 Johns. (N. Y.) 38. *In re* Marsailles Extension R. Co., L. R. 7 Ch. App. 161. But see Bank of Middlebury *v.* Rutland, etc., R. Co., 30 Vt. 159, holding that the directors may give their assent separately if that is their usual practice.

[2] Conro *v.* Port Henry Iron Co., 12 Barb. (N. Y.) 27.

[3] Hax *v.* R. T. Davis Mill Co., 39 Mo. App. 453; Despatch Line *v.* Bellamy Mfg. Co., 12 N. H. 205; Smith *v.* Los Angeles Im., etc., Assn., 78 Cal. 289; Stimson's Am. Stat. Law (1892), § 8063, citing laws of New York, Maryland, Missouri, Texas, California, Nevada, Washington, Dakota, Idaho, Utah, Florida, New Mexico, Oklahoma. Provided, of course, that they are a majority of those present and voting. And even though an equal number be present who refrain from voting, still the votes of a majority of the number necessary to form a quorum will carry a measure where there are no dissenting votes. Rushville Gas Co. *v.* City of Rushville, 121 Ind. 206. *Contra*, Lawrence *v.* Ingersoll, 88 Tenn. 52.

[4] This rule is prescribed by statute in most of the states. Stimson's Am. Stat. (1892), § 8063, subject, however, to alteration by the by-laws in some of the states. Stimson's Am. Stat. (1892), § 8071.

[5] Price *v.* Grand Rapids, etc., R. Co., 13 Ind. 58; Edgerly *v.* Emerson, 23 N. H. 555; Cram *v.* Bangor House Proprietary, 12 Me. 354; Foster *v.* Mullanphy Planing Mill Co., 92 Mo. 79.

§ 261. **Directors — Meetings — Stated and special.** — The charter sometimes provides for stated or general meetings of the board of directors, and also for the calling and holding of special meetings. It is barely necessary to suggest that where provisions are made by the charter for the time and place of holding stated meetings and for the mode of holding special meetings, those provisions must be substantially complied with in all material respects. Notice of special meetings must be given in the mode prescribed by the charter or corporate by-laws;[1] but of stated or regular meetings provided for by the charter or by-laws notice need not be given, as it is the duty of the directors to take notice of the provisions of the charter and by-laws of the company.

§ 262. **Directors — Meetings — Notice.**—Where stated meetings are held by the board at prescribed times fixed by the charter, or by-laws, or by resolution, all the directors are bound to take notice of the time and place of holding them.[2] The presumption is in favor of the regularity of the meetings of corporate directors and the burden is on the party who assails their regularity to show that there were irregularities in calling, holding or conducting the meeting,[3] and where a quorum is present the presumption is that all were notified.[4] In order that special meetings held at other times or places may be such meetings as will empower the directors present to

[1] Hunt *v.* School District, 14 Vt. 300, s. c. 39 Am. Dec. 225; Stow *v.* Wyse, 7 Conn. 214, s. c. 18 Am. Dec. 99; Matter of Long Island, etc., R. Co., 19 Wend. 37.

[2] Warner *v.* Mower, 11 Vt. 385; People *v.* Peck, 11 Wend. 604; Rex *v.* Hill, 4 Barn. & Cress. 436; Sampson *v* Bowdoinham, etc., Co., 35 Me. 78; People *v.* Batchelor, 22 N. Y. 128; Atlantic, etc., Co. *v.* Sanders, 36 N. H. 252.

[3] Wells *v.* Rodgers, 60 Mich. 525; Budd *v.* Walla Walla, etc., Co., 2 Wash. Ter. 347; Sargent *v.* Webster, 13 Metcf. 497; Leavitt *v.* Oxford, etc., Co., 3 Utah 265; Lane *v.* Brainerd, 30 Conn. 565; Chouteau, etc., Co. *v.* Holmes, 68 Mo. 601.

[4] McCall *v.* Byram, etc., Co., 6 Conn. 428; Leavitt *v.* Oxford, etc., Co., 3 Utah 265; Wells *v.* Rahway, etc., Co., 19 N. J. Eq. 402. See for an extreme case Arms *v.* Conant, 36 Vt. 744. See, generally, Wood, etc., Co. *v.* King, 45 Ga. 34; Wood *v.* Boney, (N. J.) 21 Atl. R. 574; Chase *v.* Tuttle, 55 Conn. 455, s. c. 12 Atl. R. 874, 3 Am. St. R. 64.

act for the corporation, all the directors must have proper notice of the time of meeting; but, if all the directors are present and participate in the proceedings the fact that notice has not been formally given is unimportant. If notice has not been given and the directors are not all in attendance at the meeting a very different question is presented. If some of the directors are not notified the proceedings will not, as a rule, be effective, although a quorum be present at the meeting and concur in the proceedings.[1] Notice of special meetings should be given to all the members of the board as the charter or by-laws provide, or, if no provision is made, the directors should be notified personally.[2] As we have already indicated, the rule is that if all of the directors attend at the meeting any irregularities in the manner of giving notice will be held to have been waived ;[3] and this will be true if those who were not present duly acquiesce in the action of those who attended the meeting, provided there was a quorum present at the meeting.[4] Ratification of the proceedings of a meeting previously held

[1] Bank of Little Rock *v.* McCarthy, 55 Ark. 473, s. c. 29 Am. St. R. 60; Simon *v.* Sevier, etc., Co., 54 Ark. 58; School Dist. *v.* Bennett, 52 Ark. 511; Paola, etc., R. Co. *v.* Commissioners, 16 Kan. 302; Baldwin *v.* Canfield, 26 Minn. 43; Harding *v.* Vandewater, 40 Cal. 77; Chouteau, etc., Co. *v.* Holmes, 68 Mo. 601, s. c. 30 Am. R. 807; Stevens *v.* Eden, etc., 12 Vt. 688; Gordon *v.* Preston, 1 Watts 385, s. c. 26 Am. Dec. 75; Jackson *v.* Hampden, 16 Me. 184; Farwell *v.* Houghton, etc., Works, 8 Fed. R. 66; State *v.* Ferguson, 31 N. J. L. 107; Pike County *v.* Rowland, 94 Pa. St. 238; Covert *v.* Rogers, 38 Mich. 363, s. c. 31 Am. R. 319. Compare Edgerly *v.* Emerson, 23 N. H. 569, s. c. 55 Am. Dec. 207; Bank *v.* Flour Co., 41 Ohio St. 552; Halifax, etc., R. Co., *v.* Francklyn, 8 Ry. & Corp. L. J. 91; Chase *v.* Tuttle, 55 Conn. 455, s. c. 3 Am. St. R. 64. Mr. Taylor says that the decision in Edgerly *v.* Emerson, *supra*, is erroneous. Taylor on Corp., 260, n. We concur in his view. Stow *v.* Wyse, 7 Conn. 214, s. c. 18 Am. Dec. 99.

[2] Morawetz on Priv. Corp. (2d ed.), § 532. Those present can not bind the property of the corporation against the wishes of others not notified. Doyle *v.* Mizner, 42 Mich. 332; Kersey Oil Co. *v.* Oil Creek, etc., R. Co., 5 W. N. C. (Pa.) 144. But see Edgerly *v.* Emerson, 23 N. H. 555; Bank *v.* Flour Co., 41 Ohio St. 552. If the notice be sent in the prescribed manner, but directors who are out of the state fail to receive it, the action of the other directors is not thereby nullified. Chase *v.* Tuttle, 55 Conn. 455.

[3] Judah *v.* American, etc., Co., 4 Ind. 333; Jones *v.* Milton, etc., Co., 7 Ind. 547; People *v.* Peck, 11 Wend. 604, s. c. 27 Am. Dec. 104.

[4] Reed *v.* Hayt, 109 N. Y. 659.

will give them validity, although notice of the previous meeting may have been insufficient.[1] It has been held that if no objection is made to the regularity of a meeting until an act ordered thereat has been fully performed, the legality of such act can not afterward be questioned in a court of equity on the ground of failure to give notice;[2] but this doctrine can not prevail except in cases where injustice would result to innocent parties if it were not applied.

§ 263. **Directors—Meetings—Proxies—Quorum.**—The rule prohibiting the delegation of authority requires the personal presence of directors at all meetings of the board and forbids voting by proxy. Where a definite number[3] constitutes a body intrusted with corporate duties or functions, it is necessary to effective action that a quorum of members be present, and a quorum consists of a majority of the members, unless the statute provides otherwise.[4] Proceedings at a meeting where there is not a quorum of the directors present are voidable but not absolutely void, and as they are not void they may be ratified.[5] Where a quorum is present a majority may effectively act.[6] It

[1] In absence of fraud or conspiracy, defect in notice to directors, of a special meeting, is cured by subsequent ratification of the action there taken. County Court, etc., *v.* Baltimore & O. R. Co., 35 Fed. R. 161.

[2] Samuel *v.* Holladay, 1 Woolw. (U. S.) 400.

[3] Where the body is composed of an indefinite number the rule is different. *Ante*, § 161.

[4] St. Louis, etc., Association *v.* Hennessy, 11 Mo. App. 555; Cram *v.* Bangor House, 12 Me. 354; Wickersham *v.* Crittenden, 93 Cal. 17, s. c. 28 Pac. R. 788. *Ex parte* Willcocks, 7 Cow. 402, s. c. 17 Am. Dec. 525; Hax *v.* Davis, etc., Co., 39 Mo. App. 453; Price *v.* Grand Rapids, etc., Co., 13 Ind. 58; Stringham *v.* Oshkosh, etc., Co., 33 Wis. 471; Tennessee, etc., Co. *v.* East Alabama, etc., R. Co., 73 Ala. 426.

[5] Samuel *v.* Holladay, 1 Woolw. (U. S.) 400; Hanson *v.* Dexter, 36 Me. 516; Atlantic, etc., Co. *v.* Sanders, 36 N. H. 252. A different doctrine is asserted in Price *v.* Grand Rapids R. Co., 13 Ind. 58, but that case was wrongly decided. If the act was beyond the power of the directors it would be void, and if void, not capable of ratification.

[6] Cotton *v.* Davies, 1 Stra. 53; Buell *v.* Buckingham, 16 Iowa 284, s. c. 85 Am. Dec. 516, citing 2 Kent's Com. 293, 5 Dane's Abr. 150; Cahill *v.* Kalamazoo, etc., Co., 2 Dougl. (Mich.) 124, s. c. 43 Am. Dec. 457; Sargent *v.* Webster, 13 Metc. 497, s. c. 46 Am. Dec. 743. In the opinion of Judge Dillon in Buell *v.* Buckingham are cited Rex *v.* Monday, Cowp. 530; *In re* Union, etc., Co., 22 Wend. 591; *Ex parte*, Rogers, 7 Cow. 526; South-

has been held that where the act of incorporation does not designate the number that shall constitute a quorum and confers power upon the board to enact by-laws, the by-laws may fix the number at less than a majority.[1] There is reason, we venture to suggest, for doubting the soundness of the doctrine declared in the case referred to. We think that as the rule requiring a majority in order to constitute a quorum is well established, the conclusion must be that the statute is to be considered in connection with that rule and not as a detached or fragmentary part of the law, and that silence upon the subject means that the usual and established rule of law shall prevail. A director whose presence is necessary to make a quorum can not effectively vote upon a question in which he is individually, materially and directly interested, as, for instance, upon a contract with himself and the corporation, so that as to such a question there is no quorum present since the interested person is not as to the particular matter competent to act as a director.[2] When the president is a member of the board of directors it is proper to count him in ascertaining whether a quorum is present, but if he is not a director then he can not be counted unless the act of incorporation so provides.[3]

§ 264. **Directors — Meetings outside of the state.**— It is generally held that where there is no express provision to the contrary in the charter or in some general statute, the directors may meet outside of the state by which the corporation is created, and there transact ordinary corporate business.[4] It

worth *v.* Palmyra R. Co., 2 Mich. 287; State *v.* McBride, 4 Mo. 303, s. c. 29 Am. Dec. 636; Green *v.* Weller, 32 Miss. 650; People *v.* Auditor, 33 Ill. 9.

[1] Hoyt *v.* Thompson, 5 N. Y. 320.

[2] Van Hook *v.* Somerville, etc., Co., 5 N. J. Eq. 137; Miner *v.* Belle Isle, etc., Co., 93 Mich. 97; Foster *v.* Mullanphy, etc., Mill, 92 Mo. 79; Buell *v.* Buckingham, 16 Iowa 284, s. c. 85 Am. Dec. 576; City of St. Louis *v.* Alexander, 23 Mo. 483.

[3] Glen's Falls, etc., Co. *v.* White, 18 Hun 214; Bank of Maryland *v.* Ruff, 7 Gill & J. 448.

[4] Ohio, etc., R. Co. *v.* McPherson, 35 Mo. 13, s. c. 86 Am. Dec. 128; McCall *v.* Byram, etc., Co., 6 Conn. 428; Arms *v.* Conant, 36 Vt. 744; Wood, etc., Company *v.* King, 45 Ga. 34; Bellows *v.* Todd, 39 Iowa 209; Thompson *v.* Natchez, etc., Co., 68 Miss. 423; Smith *v.* Silver Valley, etc., Co., 64 Md. 85; Bassett *v.* Monte Christo, etc., Co., 15 Nev. 293; Reichwald *v.* Commercial, etc., Co., 106 Ill. 439, 450;

seems, indeed, that they may even meet in a foreign country.[1] We have qualified our statement that meetings may be held outside of the state which created the corporation by saying that such meetings may be held for the transaction of ordinary corporate business. This we have done because it is intimated by high authority that there are acts which can not be rightfully done outside of the state.[2] It is, however, not easy to conceive what acts within the power of the board of directors may not be as well performed in one state as in another.[3] Some of the authorities make a distinction between the acts of the corporation itself and the acts of its officers and agents, holding that corporate acts which the corporation itself must do should be performed within the limits of the state by which it was created.

§ 265. **Directors — Proceedings — Record.**—The statutes of many of the states require the directors to cause a record of their proceedings to be kept, and where such statutes exist it is the duty of the directors to cause a record of their proceedings to be made. Where there is no such statute, sound business policy requires a record of all the proceedings to be kept. But the failure or neglect of corporate officers to keep a record of their proceedings can not, as a rule, prejudice the rights of third persons. Where a record is made and third persons have in

Smith *v.* Alvord, 63 Barb. 415; Missouri, etc., Co. *v.* Reinhard, 114 Mo. 218.

[1] Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 519.

[2] In Galveston Railroad *v.* Cowdrey, 11 Wall. 459, 476, the court said: "No doubt it may be true, in many cases, that the extra territorial acts of directors would be held void, as in the case cited from the Fourteenth New Jersey Chancery Reports, 383, where a set of directors of a New Jersey corporation met in Philadelphia, against a positive prohibitory statute of New Jersey, and improperly voted themselves certain shares of stock. *And other cases may be put where their acts would be held void without a prohibitory statute*, and it is generally true that a corporation exists only within the jurisdiction of the territory that created it." See Hilles *v.* Parrish, 14 N. J. Eq. 380; Warren, etc., Co. *v.* Ætna, etc., Co., 2 Paine 501; Bank of Virginia *v.* Adams, 1 Parson Eq. Cas. 534; Freeman *v.* Machias, etc., Co., 38 Me. 343.

[3] In Wright *v.* Bundy, 11 Ind. 398, 404, the court said: "The mere place where the active agents of a corporation enter into a contract must, in general, be immaterial. The material question must be one of power, not of place."

good faith acquired rights upon the faith thereof the company will be estopped, provided the acts evidenced by the record were not *ultra vires*.[1] As a rule entries of record duly made in regular course are *prima facie* evidence of the facts recited.[2] The familiar general rule is that stockholders have a right to inspect the corporate records,[3] and it is held that it is no excuse for refusing to permit an inspection that the shareholder proposes to be assisted in the examination by his attorney.[4] Record entries, duly made and signed, may be sufficient evidence of a contract so as to take a case out of the statute of frauds.[5]

§ 266. **Directors — Corporate records as evidence.** — The primary evidence of the proceedings of the board of directors is the record;[6] but, as elsewhere shown, the rights of third persons are not prejudiced by the failure to keep a record, nor will the failure to keep a record preclude resort to parol testimony in the proper case.[7] Entries duly made are held com-

[1] Stratton *v.* Lyons, 53 Vt. 130. A corporation is not bound where fraudulent interpolations have been made in its records without any fault on its part or that of its agents or officers. Holden *v.* Hoyt, 134 Mass. 181. It would be otherwise if the corporation were in fault.

[2] Heintzelman *v.* Druids', etc., Assn. 38 Minn. 138; McDaniels *v.* Flower Brook, etc., Co., 22 Vt. 274; Sanborn *v.* School District, 12 Minn. 17; Isbell *v.* N. Y., etc., Railroad Co., 25 Conn. 556; Hawkshaw *v.* Supreme Lodge, etc., 29 Fed. R. 770; Beardsley *v.* Johnson, 49 Hun 607, 1 N. Y. Supp. 608; Hathaway *v.* Addison, 48 Me. 440.

[3] Commonwealth *v.* Phenix, etc., Co., 105 Pa. St. 111, s. c. 23 Am. L. Reg. (N. S.) 388, 23 Cent. L. J. 584, and notes; Redfield on Railways 227; Grant on Corp. 311, Beach on Railways, § 406; Angell & Ames Corp., § 681; Wharton on Evidence, § 746; Morawetz on Corp., § 473.

[4] People *v.* Nassau, etc., Co., 86 Hun 128, 33 N. Y. S. 244. *Ante*, § 172.

[5] Jones *v.* Victoria, etc., Co., L. R. 2 Q. B. D. 314; Argus Co. *v.* Mayor, 55 N. Y. 495.

[6] Dial *v.* Valley, etc., Assn., 29 So. Car., 560, s. c. 8 S. E. R. 27; Bowick *v.* Miller, 21 Ore. 25, s. c. 26 Pac. R. 861; Buncombe, etc., Co. *v.* McCarson, 1 Dev. & B. 306; Owings *v.* Speed, 5 Wheat, 420, 424; Thayer *v.* Middesex, etc., Co., 10 Pick. 326; Clark *v.* Farmers', etc., Co., 15 Wend. 256; Wells *v.* Rahway, etc., Co., 19 N. J. Eq. 402; Haven *v.* New Hampshire Asylum, 13 N. H. 532.

[7] *Post*, § 267; Allis *v.* Jones, 45 Fed. R. 148; Melledge *v.* Boston, etc., Co., 5 Cush. (Mass.) 158; Pickett *v.* Abney, 84 Tex. 645, s. c. 19 S.W. R. 859; Morrill *v.* C. T., etc., Co., 32 Hun 543; Nashua, etc., R. Co. *v.* Boston, etc., R. Co., 27 Fed. R. 821; Whiting *v.* Wellington, 10 Fed. R. 810; Bay View, etc., Co. *v.* Williams, 50 Cal. 353.

petent evidence to prove payments to an employe of the company,[1] but it is held that corporate records are not competent to prove a claim against strangers to the company.[2] We suppose, however, that for some purposes corporate records are admissible even as against third persons, as, for instance, to show that a meeting of the directors was held on a certain day, or the like. Record entries are generally competent evidence against officers of the company,[3] but are not, of course, always conclusive upon them. A fraudulent entry may be attacked,[4] or the good faith of the directors' acts may be inquired into by giving parol proof as to what they really did.[5]

§ 267. **Proof of the proceedings of the board of directors.**— Where the act of incorporation prescribes the mode in which the proceedings of the board of directors shall be proved, the mode prescribed is exclusive. Where there is a record, of course that is the best evidence, and must be produced or some excuse shown justifying a resort to secondary evidence. But where it is not in conflict with some provision of the charter, the acts of the directors of a corporation, if not recorded, may be proved by parol.[6] Where records are lost, parol

[1] Ganther *v.* Jenks & Co., 76 Mich. 510, s. c. 43 N.W. R. 600. See Humphrey *v.* People, 18 Hun 393; Huntington *v.* Attrill, 118 N. Y. 365.

[2] Grayille *v.* New York, etc., Co., 34 Hun 224; Blair *v.* St. Louis, etc., R. Co., 25 Fed. R. 684.

[3] First Nat. Bank *v.* Tisdale, 84 N. Y. 655; Allison *v.* Coal Co., 87 Tenn. 60, s. c. 9 S.W. R. 226. See Wallace *v.* Lincoln, etc., Bank, 89 Tenn. 630, s. c. 15 S. W. R. 448; Spellier, etc., Co. *v.* Geiger, 147 Pa. St. 399. s. c. 23 Atl. R. 547; Rudd *v.* Robinson, 126 N. Y. 113; Rudd *v.* Robinson, 54 Hun 339; Olney *v.* Chadsey, 7 R. I. 224.

[4] Thorne *v.* Travellers Ins. Co., 80 Pa. St. 15.

[5] Waite *v.* Windham Co. Mining Co., 36 Vt. 18.

[6] Langsdale *v.* Bonton, 12 Ind. 467; Junction R. Co. *v.* Reeve, 15 Ind. 236. In the case of Ten Eyck *v.* Pontiac, etc., R. Co., 74 Mich. 226, s. c. 37 Am. & Eng. R. Cases, 273, the court said: "What is resolved upon at a meeting of a board of directors of a private corporation may be proven by the record of the proceedings of the board, if one is kept, and the proceedings entered, but if a record is not kept or the proceedings not recorded, parol evidence is admissible to show what was resolved upon, and by what vote it was carried." See Cram *v.* Bangor, etc., 12 Me. 354; Edgerly *v.* Emerson, 23 N. H. 555; McCall *v.* Byram, etc., Co., 6 Conn. 428; Zihlman *v.* Cumberland, etc., Co., 74 Md. 303, s. c. 22 Atl. R. 271; *In re* Great Northern, etc., Co., 62 L. T. R. 231; Bank of Yolo *v.* Weaver (Cal.), 31 Pac. R. 160.

evidence of their contents is competent.[1] It is held that omissions in the records may be supplied by parol proof.[2]

§ 268. **Notice to directors.**—Notice to the directors, when acting in their official capacity, is notice to the company.[3] Notice to individual directors when not acting for the corporation is not effective as notice to the corporation.[4] If the notice is effective upon directors in office it is effective upon their successors in office.[5]

[1] Dix *v.* Akers, 30 Ind. 431.

[2] Taymouth *v.* Koehler, 35 Mich. 22; Ratcliff *v.* Teters, 27 Ohio St. 66.

[3] Fulton Bank *v.* New York, etc., Canal Co., 4 Paige 127; Cragie *v.* Hadley, 99 N. Y. 131, s. c. 1 N. E. R. 537.

[4] Gridley *v.* Lafayette, etc., Co., 71 Ill. 200; *In re* German Mining Co., 4 De G. M. & G. 19.

[5] United, etc., Co. *v.* Shriver, 3 Md. Ch. 381; Washington Bank *v.* Lewis, 22 Pick. 24; Farmers' etc., Bank *v.* Payne, 25 Conn. 444; Fulton Bank *v.* New York, etc., Co., 4 Paige, 127; Louisiana, etc., Bank *v.* Senecal, 13 La. 525; Edwards *v.* Grand Junction R. Co., 1 Myl. & Cr. (13 Eng. Ch. R. 559) 650; Lancey *v.* Bryant, 30 Me. 466; Pemigewassett Bank *v.* Rogers, 18 N. H. 255. The settled rule is that directors acting as individuals merely can not bind the company in any way, and the fact that one or two directors, constituting a minority of the board, have knowledge as individuals of certain facts is insufficient to prove notice to the corporation. Winchester *v.* Baltimore, etc., R. Co., 4 Md. 231; Mercier *v.* Canonge, 8 La. Ann., 37; Fulton Bank *v.* New York, etc., Canal Co., 4 Paige (N. Y.) 127; Peruvian R. Co. *v.* Thames, etc., Ins. Co., L. R. 2 Ch. App. Cas. 617. Notice given to a director as an official to be communicated to the board has been held to bind the corporation. Boyd *v.* Chesapeake, etc., Canal Co., 17 Md. 195; National Bank *v.* Norton, 1 Hill (N. Y.) 572. It would seem that any knowledge of facts which comes to a director or directors privately, or by public rumor, but which is not communicated by them to the board will not bind the corporation. U. S. Ins. Co. *v.* Shriver, 3 Md. Ch. 381; Commercial Bank *v.* Cunningham, 24 Pick. (Mass.) 270. Though if such knowledge is actually imparted by such director to the board at a regular meeting, the corporation is bound. Bank of Pittsburgh *v.* Whitehead, 10 Watts. 397. It is held in a few cases that the knowledge of a director who acts upon the matter as to which he has such knowledge, is the knowledge of the board, without regard to the manner in which he acquired it, and even though he did not communicate it to his fellows. Bank of U. S. *v.* Davis, 2 Hill (N. Y.) 451; North River Bank *v.* Aymar, 3 Hill (N. Y.) 262. But this principle is opposed by the weight of authority, and it has been held repeatedly, that where the interests of a director are opposed to those of the corporation no knowledge possessed by him will be imputed to it. Hatch *v.* Ferguson, 66 Fed. R. 668, 676; Winchester *v.* Baltimore, etc., R. Co., 4 Md. 231; Frenkel *v.* Hudson, 82 Ala. 158, s. c. 2 So. R. 758;

§ 269. **Directors—Admissions and declarations.**—Substantially the same rules which prevail in regard to officers and agents generally govern the subject of admissions and declarations by directors, but there is this important exception, namely, the directors, in order to bind the company, should act as a board duly convened. Admissions and representations must, as a rule, be made by at least a quorum of the directors acting as a body, in order to bind the corporation, unless special authority is shown.[1] When made at a time the board is not in session, they are the statements of individuals, and not of corporate representatives, except in cases where they are authorized to act as agents. It follows from the general rule we have stated that neither one director, nor any number of directors, except in cases where there is special authority from the company, can bind it by admissions or declarations.[2] Where, however, a director has special authority to act as an agent for the company, he can, of course, bind it by his acts and admissions like any other agent,[3] but his acts bind the company because of the special authority, and not simply because of his position

Wickersham *v.* Chicago Zinc Co., 18 Kan. 481; First Nat. Bank *v.* Gifford, 47 Iowa 575; Barnes *v.* Trenton Gas L. Co., 27 N. J. Eq. 33; Innerarity *v.* Bank, 139 Mass. 322, s. c. 1 N. E. R. 282; Commercial Bank *v.* Cunningham, 24 Pick. (Mass.) 270. And knowledge by the directors of their own mismanagement will not be imputed to the corporation to raise the bar of the statute of limitations in a suit against them by the corporation or its stockholders. Ryan *v.* Leavenworth, etc., R. Co., 21 Kan. 365, 404.

[1] Huntingdon, etc., R. Co., *v.* Decker, 82 Pa. St. 119; Soper *v.* Buffalo, etc., R. Co., 19 Barb. (N. Y.) 310; Thew *v.* Porcelain Mfg. Co., 5 S. C. 415; Michigan, etc., R. Co. *v.* Gougar, 55 Ill. 503; Vicksburg, etc., R. Co. *v.* Ragsdale, 54 Miss. 200; Low *v.* Connecticut, etc., R. Co., 45 N. H. 370. See Titus *v.* Cairo, etc., Bank, 37 N. J. Law 98; Meux's Case, 2 De Gex, M. & G. 522; Tottendell *v.* Fareham, etc., Co., L. R. 1 C. P. 674; St. Louis, etc., R. Co. *v.* Drennan, 26 Ill. App. 263.

[2] Michigan Cent. R. Co. *v.* Gougar, 55 Ill. 503; Low *v.* Connecticut, etc., R. Co., 45 N. H. 370; Fairfield County Turnp. Co. *v.* Thorp, 13 Conn. 173; Smith *v.* North Carolina R. Co., 68 N. C. 107; Charleston, etc., R. Co. *v.* Blake, 12 Rich. L. (S. C.) 634; Matteson *v.* New York Cent. R. Co., 62 Barb. (N. Y.) 364; Pennsylvania R. Co.'s Appeal, 80 Pa. St. 265. Although a director of a railroad company owns a majority of the stock he can not bind the company by a contract. Allemong *v.* Simmons, 124 Ind. 199, 7 R. R. & Corp. L. J. 416.

[3] Burnes *v.* Pennell, 2 H. L. Cases 497; Meux's Case, 2 DeG., M. & G. 522.

as a director. In a case where a director is invested with special authority, then as to such matters as his authority covers notice to or knowledge acquired by him, is notice to the board of directors and the corporation.[1]

§ 270. **Ratification of the acts of directors.**—The ordinary rules respecting the ratification of the acts of agents apply to the acts of directors. Some of the authorities indicate that as directors are officers of superior rank, ratification will be presumed upon less evidence than is required in cases where the acts are those of subordinate agents. Any acts which the corporation can authorize the directors to perform may be made valid by subsequent ratification, although they were outside of the directors' powers when performed.[2] The state may, by a subsequent legislative enactment, give validity to their unauthorized acts.[3] But we suppose that where the acts of the directors are entirely outside of the scope of their authority the state could not impose new and additional burdens upon the stockholders, thereby essentially changing the charter, without the consent, express or implied, of the stockholders of the company.

§ 271. **Directors—Removal from office.**—The general rule is that a board of directors has no implied power to remove one of the directors and declare his office vacant. The power of removal may, of course, be given by the act of incorporation or by corporate by-laws enacted in accordance therewith, but the power is not inherent or implied. A director can not, as a rule, be deprived of his office nor excluded by the board from taking part in its proceedings;[4] but we are inclined to

[1] Hoover *v.* Wise, 91 U. S. 308; Fairfield Savings Bank *v.* Chase, 72 Me. 226; Fulton Bank *v.* Canal Co., 4 Paige Ch. (N. Y.) 127; Gen. Ins. Co. of Md. *v.* U. S. Ins. Co. of Baltimore, 10 Md. 517.

[2] McLaughlin *v.* Detroit, etc., R. Co., 8 Mich. 99; Farmers', etc., Co. *v.* Toledo, etc., R. Co., 67 Fed. R. 49. See Higgins *v.* Lansingh, 154 Ill. 301, s. c. 40 N. E. R. 362. We do not mean, of course, to say that acts which as to the corporation itself are *ultra vires* can be ratified.

[3] Coe *v.* New Jersey Midland R. Co., 31 N. J. Eq. 105.

[4] If they were to attempt to wrongfully exclude a director, he is entitled

believe that there may be extraordinary cases where there is a clear and undoubted betrayal of trust in which the board would be justified in excluding one of its members from taking part in its proceedings.[1] A director can not, according to many of the decided cases, be removed by a majority of the stockholders themselves,[2] unless the power to remove is given by the charter or by-laws.[3] It is said that to allow a majority of the stockholders to remove the directors at will would, to a very considerable extent, nullify the well settled rule that the discretion of the directors can not be controlled by the stockholders; but this line of reasoning is not very satisfactory. We can see no sufficient reason why the power of removal may not be vested in those who actually own the corporation and are primarily and principally interested, nor can we avoid the conclusion that some of the courts have been misled by the early decisions regarding charitable corporations. The rules which apply to charitable corporations can not apply in all their vigor to business corporations such as railway companies. It is reasoned in other cases that the interests of shareholders may be protected without the exercise of this power, since the directors, being trustees for the stockholders, may be removed by the court for an abuse of their powers, upon application to

to an order restraining them from so doing. Pulbrook *v.* Richmond, etc., Co., L. R. 9 Ch. Div. 610.

[1] Some of the courts hold that a director can not be prevented from examining corporate records and books, but may secure an examination by mandamus, although the opposing directors regard him as acting in opposition to the corporate rights and interests. People *v.* Mott, 1 How. Pr. 247; People *v.* Throop, 12 Wend. 183. But we believe that there may be extreme cases where a director can be denied the right of inspection. State, *ex rel.* Rosenfield *v.* Einstein, 46 N. J. L. 479.

[2] Imperial, etc., Co. *v.* Hampson, L. R. 23 Ch. Div. 1, 7; State *v.* Bryce, 7 Ohio (2d pt.) 82. But see Bayless *v.* Orne, Freem. Ch. (Miss.) 161, 176; Adamantine Brick Co. *v.* Woodruff, 4 McArthur (D. C.) 318; Burr *v.* McDonald, 3 Gratt. (Va.) 215, 224, holding that the director's right to his office being forfeited by his misconduct, he may be removed by the stockholders.

[3] Mr. Taylor says: "The by-laws may, and to avoid controversy, certainly should provide for removals from office," citing Hunter *v.* Sun Mut. Ins. Co., 26 La. Ann. 13. Taylor on Priv. Corp. (2d ed.), § 649. The general laws of a number of the states provide for the removal of di-

it by the parties in interest, and hence the stockholders should not be invested with power of removal.[1] Where power is given to the stockholders by the charter or by-laws to remove directors for a reasonable cause, the court will not inquire into the sufficiency of a cause upon which they have acted,[2] nor will it interfere to control the actions of the directors under such conditions, but will leave the stockholders to depose them in case they do not perform their duties properly.[3]

§ 272. **Compensation of directors.**—We have elsewhere treated in a general way of the compensation of corporate officers,[4] and we shall not again discuss the general subject. It may be said by way of preface that, ordinarily, directors are not entitled to compensation for services rendered in the capacity of directors unless provision is made for the payment of compensation by the charter or by-laws, nor will a contract to pay for such services be implied. Where, however, a director performs services under a contract that are clearly beyond the range of his official duties he is entitled to such compensation as a stranger performing similar services would be entitled to receive.[5] Unless the compensation is fixed by resolution or

rectors from office. Stimson's Am. Stat. (1892), § 8048. By-laws of a corporation providing that when any director shall die, resign, neglect to serve, or remove out of the county, the board may proceed to supply the vacancy, do not authorize a director to be ousted by a vote of the board of directors on the ground of ineligibility. Commonwealth *v.* Detwiller, 131 Pa. St. 614, s. c. 7 L. R. A. 357, 18 Atl. R. 990, 28 Am. & Eng. Corp. Cas. 669.

[1] Ward *v.* Davidson, 89 Mo. 445. Making use of his position to further his private gains, or ceasing to hold the requisite number of shares, will cause a director to cease to hold his office in England. Companies Clauses, Act of 1845, 8 Vict. Ch. 16, § 86.

[2] Inderwick *v.* Snell, 2 Macn. & G. 216.

[3] Moses *v.* Tompkins, 84 Ala. 622; Hattersley *v.* Earl of Shelburne, 10 Week. R. 881, s. c. 31 L. J. Ch. 873.

[4] *Ante*, § 230.

[5] Jackson *v.* New York Central R. Co., 2 Thompson & C. (N. Y.) 653; New York, etc., R. Co. *v.* Ketchum, 27 Conn. 170; Shackelford *v.* New Orleans, etc., R. Co., 37 Miss. 202; Lafayette, etc., R. Co. *v.* Cheeney, 87 Ill. 446; Hodges *v.* Rutland, etc., R. Co., 29 Vt. 220. A director who performs services for the corporation at the request of the board of directors, is entitled to recover, on an implied contract, what the services are reasonably worth, so far as the amount has not been fixed by resolution of the

by-law before the services are rendered, a director is, as a rule, not entitled to pay for his services.[1] The fact that a director expected to be paid for his services will not alter the rule,[2] and a subsequent promise to pay for them is ineffective for lack of consideration.[3] The compensation which has been

board. Ten Eyck *v.* Pontiac, O. & P. A. R. Co., 74 Mich. 226. A director who, independently of his duties as director, performs services for, and furnishes materials to, the corporation, which are necessary and proper, has the same right as other persons to recover upon an implied contract for such services and materials. Greensboro, etc., Turnp. Co. *v.* Stratton, 120 Ind. 294. To entitle him to pay there must have been an expectation at the time, on the part of the corporation, to pay therefor. Gill *v.* New York Cab Co., 48 Hun 524, 16 N. Y. S. R. 236. In Shackelford *v.* New Orleans, etc., R. Co., *supra*, it was held that attendance on the board meetings is the only service which a director will be presumed to render gratuitously. In Rogers *v.* Hastings, etc., R. Co., 22 Minn. 25, it was held that a director who rendered special services as attorney and land commissioner at the request of the other directors might recover therefor. The question whether or not the services rendered were special, so that he is entitled to pay therefor, depends upon whether they were such as could be rendered by a person other than a director. Henry *v.* Rutland, etc., R. Co., 27 Vt. 435. And a director may recover for services rendered by him as agent of the company at its request, but not in his character as director. Chandler *v.* Monmouth Bank, 13 N. J. Law, 255. But it has been held that a director can not, in the absence of contract, claim a commission for the sale of the corporation bonds. Hodges *v.* Rutland, etc., R. Co., 29 Vt. 220. And that he can not claim pay for services as managing director. *Re* Bolt & Iron Co., 14 Onta. R. 211, 19 Am. & Eng. Corp. Cas. 165. And that even a director who serves without compensation can not recover a reward offered by the corporation for the recovery of stolen property and the detection of the thief, since he only did his duty if he accomplished both. Stacy *v.* State Bank, 5 Ill. (4 Scam.) 91; Collins *v.* Godefroy, 1 Barn. & Adol. 950.

[1] Kilpatrick *v.* Penrose Ferry Bridge Co., 49 Pa. St. 118; New York, etc., R. Co. *v.* Ketchum. 27 Conn. 170; Hodges *v.* Rutland, etc., R. Co., 29 Vt. 220; Coleman *v.* Second Ave. R. Co., 38 N. Y. 201. It is presumed that a stockholder, not a director of the corporation, who assumes the duties of the office and performs them without any agreement or provision for compensation, performs the official services gratuitously. Mather *v.* Eureka Mower Co., 118 N. Y. 629, s. c. 23 N. E. R. 993. An officer of a corporation, in order to recover compensation for his services, must show that he is an officer *de jure*. 34 Ill. App. 268, affirmed in Waterman *v.* Chicago & I. R. Co., 139 Ill. 658.

[2] New York, etc., R. Co. *v.* Ketcham, 27 Conn. 170.

[3] Maux Ferry G. R. Co. *v.* Branegan, 40 Ind. 361; Loan Assn. *v.* Stonemetz, 29 Pa. St. 534; Dunston *v.* Imp. Gas. Co., 3 B. & Ad. 125. He may receive pay for services rendered before he became a director, under a resolution passed by the other members of

fixed by the board may be increased by a vote of the board during his term, and will entitle him to such increased compensation for all services thereafter rendered.[1] But while it is competent for the board to fix the compensation to be given to directors as well as that of other officers and agents,[2] unless the by-laws or statute expressly provide otherwise, a director may also fill another office of the corporation;[3] but where a director fills such other office, he will be entitled only to such compensation therefor as is fixed or agreed upon before the services are rendered.[4]

§ 273. **Directors — Relation of to stockholders — Preliminary.**—The directors of a railroad company occupy a fiduciary relation to the stockholders. The relation is, it is true, essentially one of trust and confidence; but directors are not trustees in the strict or technical sense, since they do not hold the legal title to the corporate property and may in some cases deal with the corporation where their own individual interests are concerned. They are, however, trustees in the sense in which the term "trustees" is often used. The courts and text writers generally speak of them as trustees, and correctly so;

the board. Branch Bank *v.* Collins, 7 Ala. 95; New York, etc., R. Co. *v.* Ketchum, 27 Conn. 170.

[1] It having been understood by the board of directors of a corporation that its officers were to be paid for their services, the board may afterwards fix and pay a reasonable sum. Stewart *v.* St. Louis, Ft. S. & W. R. Co., 41 Fed. R. 736.

[2] Hodges *v.* Rutland, etc., R. Co., 29 Vt. 220.

[3] A director may also be treasurer. Sargent *v.* Webster, 13 Met. (Mass.) 497.

[4] Holder *v.* Lafayette, etc., R. Co., 71 Ill. 106, where the director served as treasurer. Rogers *v.* Hastings, etc., R. Co., 22 Minn. 25, where he served as secretary. It has been held that the action of the board of directors of a corporation in providing that the salary of the president should be fixed by him and another director, who together owned nearly all the stock, and that the contract was ratified by the board of directors, is such an exercise of the board's authority to fix his salary as to constitute a contract on which he can recover. Bagaley *v.* Pittsburgh & L. S. Iron Co., 146 Pa. St. 478, s. c. 23 Atl. R. 837. We think that the case referred to is well decided, for the reason that there was an effective ratification of the acts of the president and the director authorized to act in conjunction with him, but if it were not for the element of ratification we should think there could be no recovery in such a case.

but the use of the term trustees seems to have misled some judges and writers, for they have applied stricter rules to directors than authority sanctions or principle warrants. In the sense in which the term "trustees" is used in reference to the functions and duties of persons occupying fiduciary relations directors are trustees in all that term implies and are subject to the rules which govern that class of persons, but they are not trustees in the same sense as persons are who hold the legal title to property for the benefit of other persons, nor are they trustees for third persons who deal with the company.[1]

§ 274. **Directors considered trustees.**—It is held in a very great number of cases that a director occupies the position of a trustee for the stockholders,[2] and as such is prohibited from making use of his position or of the knowledge acquired by reason of holding the same to promote, either directly or indirectly, his private advantage at the expense of the corporation. The rule governing trustees generally, which prohibits them from using trust property for their own profit, applies to directors. Directors are bound to exercise the utmost good faith,[3]

[1] In Briggs *v.* Spaulding, 141 U. S. 132, s. c. 11 Sup. Ct. R. 924, the court said: "Bank directors are often styled 'trustees,' but not in any technical sense. The relation between the corporation and them is rather that of principal and agent; certainly so far as creditors are concerned the relation is that of contract and not of trust. But, undoubtedly, under circumstances they may be treated as occupying the position of trustees to *cestui que trust.*" Spering's Appeal, 71 Pa. St. 11.

[2] Robinson *v.* Smith, 3 Paige 222, s. c. 24 Am. Dec. 212; Stewart *v.* Lehigh Valley R. Co., 38 N. J. L. 505; European, etc., R. Co. *v.* Poor, 59 Me. 277; Blake *v.* Buffalo Creek R. Co., 56 N. Y. 485; Ward *v.* Salem St. R. Co., 108 Mass. 332; Covington, etc., R. Co. *v.* Bowler, 9 Bush. (Ky.) 468; San Francisco, etc., R. Co. *v.* Bee 48 Cal. 398; Paine *v.* Lake Erie R. Co., 31 Ind. 283; Great Luxembourg R. Co. *v.* Magnay, 25 Beav. 586; Aberdeen R. Co. *v.* Blakie, 1 Macq. 461; Koehler *v.* Black River Falls Co., 2 Black (U. S.) 715; Michigan Air Line R. Co. *v.* Mellen, 44 Mich. 321; Verplanck *v.* Mercantile, etc., Co., 1 Edw. Ch. 84; Simons *v.* Vulcan, etc., Co., 61 Pa. St. 202, s. c. 100 Am. Dec. 628; Bradbury *v.* Barnes, 19 Cal. 120; Hale *v.* Republican, etc., Co., 8 Kan. 466; Koehler *v.* Black River, etc., Co., 2 Black. (U. S.) 715; York, etc., Co. *v.* Hudson, 16 Beav. 485; Imperial, etc., Assn. *v.* Coleman, L. R. 6 H. L. 189; Albion, etc., Co. *v.* Martin, 1 Ch. Div. 580; Bennett's Case, 5 De Gex., M. & G. 284; Williams *v.* Page, 24 Beav. 654.

[3] See cases in preceding note. The fact that a person has relatives on the

but are not absolutely prohibited from dealing with the corporation. Directors are bound to exercise their powers to promote the corporate interests and it is a breach of duty for them to make use of their powers to injure the corporate interests or impair corporate rights. They are guilty of a breach of trust if they make use of corporate property or funds for their individual gain.[1] A director can not, without an inexcusable breach of trust, place himself in a position which will render him unable to exercise his powers for the promotion of the corporate welfare.[2] Directors are under a strict obligation to exercise care and diligence to preserve the property and money of the company. They have no right to make gifts of corporate property,[3] nor to allow unjust or illegal claims to be enforced against the company.[4]

§ 275. **Directors as trustees—Illustrative cases.**—As we have said in another place, directors are considered as trustees of the corporation and its shareholders, but not of third persons.[5] The scope and application of the general doctrine is better shown by reference to the adjudged cases than by general statements, and we shall refer to some of the many decisions of the court upon the subject. Directors may, in good faith, and for a fair, valuable consideration, sell corporate property to one of their number, but such a transaction will be closely scrutinized and

board of directors of a corporation will not defeat his valid claim against the corporation. Rollins *v.* Shaver Wagon & C. Co., 80 Iowa 380, 45 N. W. 1037.

[1] Ward *v.* Davidson, 89 Mo. 445; Wardell *v.* Railroad Co., 103 U. S. 651; Cook *v.* Sherman, 20 Fed. R. 167, and note; Smith *v.* Smith, 3 Des. Eq. S. Car. 557; Goodin *v.* Cincinnati, etc., Co., 18 Ohio St. 169; Morawetz Corp. 182, 183; Peirce on Railroads, 36.

[2] Attaway *v.* Third Nat. Bank, 93 Mo. 485. Primarily the breach of duty by a director is a wrong inflicted upon the corporation, but a breach of duty may also be injurious to third persons; thus where a director sells his influence in such a way as to give one creditor of the corporation an advantage over its other creditors, his action is unlawful. Berryman *v.* Cincinnati, etc., R. Co., 14 Bush. (Ky.) 755; Bliss *v.* Matteson, 45 N. Y. 22.

[3] St. Louis, etc., Co. *v.* Partridge, 8 Mo. App. 580. See Williams *v.* Page, 24 Beav. 654; Minor *v.* Mechanics' Bank, 1 Pet. 46.

[4] Lowndes *v.* Garnett, etc., Co., 33 L. J. Ch. 418.

[5] Briggs *v.* Spaulding, 141 U. S. 132, s. c. 11 Sup. Ct. R. 924; Landis *v.* Sea Isle, etc., Co., (N. J. Eq.) 31 Atl. R. 755.

if not entirely fair and free from fraud will be set aside.[1] A director can not purchase property for the corporation, treat it as a purchase by himself and charge the corporation a profit.[2] The decisions authorize the conclusion that directors may engage in a competing business on their individual account,[3] and this doctrine, if kept within reasonable limits, we regard as sound, but, as we believe, a director can not engage in a competing business if the necessary and natural effect of his engaging in that business is to impair his power to discharge his duty to the company of which he is a director, or to detract from his fidelity to that company. The doctrine of the case referred to is one to be limited, not extended, and if it appears in such a case that the director is in any way using his official position to the injury of the company or its business, for the advancement of his own business or that of a rival of his company of which he is a director, a stockholder should be awarded relief, for it is certainly the duty of the director to do all that he reasonably can to promote the interests of the company of which he is such officer.[4] It has been adjudged that an order of a board of directors awarding compensation to one of their number is voidable where it required the vote of the director to make the order,[5] but we suppose it is competent to

[1] Mish *v.* Main, 81 Md. 36, s. c. 31 Atl. R. 799.

[2] Blair, etc., Co. *v.* Walker, 50 Iowa 376; McElhenny's Appeal, 61 Pa. St. 188; Averill *v.* Barber, 6 N. Y. Supp. 255; Simons *v.* Vulcan Oil Co., 61 Pa. St. 202; Getty *v.* Devlin, 54 N. Y. 403; Benson *v.* Heathorn, 1 Y. & C. 326; Rice's Appeal, 79 Pa. St. 168; Great Luxembourg R. Co. *v.* Magnay, 25 Beav. 586. See, generally, European, etc., R. Co. *v.* Poor, 59 Me. 277; Gifford *v.* New Jersey R. Co., 10 N. J. Eq. 171; Stevens *v.* Rutland, etc., R. Co., 29 Vt. 545; Ware *v.* Grand Junction, etc., Co., 2 Russ. & M. 470; Dodge *v.* Woolsey, 18 How. (U. S.) 331.

[3] Barr *v.* Pittsburg, etc., Co., 51 Fed. R. 33. See, also, Barr *v.* Pittsburg, etc., Co., 40 Fed. 412.

[4] Keokuk, etc., Co. *v.* Davidson, 95 Mo. 467; Perry *v.* Tuscaloosa, etc., Co., 93 Ala. 364, s. c. 9 So. R. 217; Blake *v.* Buffalo, etc., Co., 56 N. Y. 485; Huffman, etc., R. Co. *v.* Cumberland, etc., Co., 16 Md. 456; Cumberland, etc., Co. *v.* Sherman, 30 Barb. 553; Cumberland, etc., Co. *v.* Parish, 42 Md. 598; Union Bank *v.* Jones, 4 La. Ann. 236; Paine *v.* Lake Erie, etc., Co., 31 Ind. 283; Gallery *v.* National, etc., Bank, 41 Mich. 169, s. c. 32 Am. R. 149; Fitzgerald *v.* Fitzgerald, etc., Co., 44 Neb. 463, s. c. 62 N. W. R. 899.

[5] Wickersham *v.* Crittenden, 106 Cal. 327, s. c. 39 Pac. R. 602.

provide compensation where the services are rendered outside of the duties of the director and the order is adopted by a sufficient vote, exclusive of that of the interested director. Contracts between directors that they should have a percentage upon all money secured by means of a bond of indemnity executed by them, providing against the future indebtedness of the company are voidable.[1] A director can not rightfully enter into any engagement or contract which is prejudicial to the corporation or its shareholders, since his duty requires of him that he shall exercise his powers for the promotion of the corporate interests,[2] but this general rule does not go to the extent of interdicting him from making an open, fair and honest contract with the corporation, although such a contract may yield him a personal benefit. A well considered case holds that the purchase of a railroad by one of the directors without the consent of the company will be set aside upon re-payment to the director of the money expended by him in making the purchase.[3] Directors can not rightfully make unjust or unfair discrimination in favor of particular stockholders.[4] The cases generally assert that directors can not buy claims against the corporation at less than their face, and recover the full value of the corporation,[5] but we think this rule is subject to exceptions,

[1] Butler *v.* Cornwall Iron Co., 22 Conn. 335.

[2] Woodstock Iron Co. *v.* Richmond, etc., Co., 129 U. S. 643, s. c. 9 Sup. Ct. R. 402; citing Linder *v.* Carpenter, 62 Ill. 309; St. Louis, etc., Railroad Co. *v.* Mathers, 71 Ill. 592; Holladay *v.* Patterson, 5 Or. 177; Pacific Railroad Co. *v.* Seely, 45 Mo. 212; Racine, etc., Bank *v.* Ayres, 12 Wis. 570; Fort Edward, etc., Plank Road Co. *v.* Payne, 15 N. Y. 583. It may not be improper to observe that a contract by which any person undertakes to do an act forbidden by public policy is voidable, and that the fact that persons who enter into such contracts are directors of a railroad company is not important where public policy is violated, but the position of director sometimes creates the public policy, for it is public policy not to permit corporate officers to make contracts which may tempt or influence them to betray their trusts.

[3] Covington, etc., R. Co. *v.* Bowler, 9 Bush. (Ky.) 468. See Bill *v.* Western Union Tel. Co., 16 Fed. R. 14; Jones *v.* Arkansas, etc., Co., 38 Ark. 17; Bent *v.* Priest, 10 Mo. App. 543; Dorris *v.* French, 4 Hun 292.

[4] Chase *v.* Vanderbilt, 62 N. Y. 307.

[5] McDonald *v.* Haughton, 70 N. C. 393; Brewster *v.* Stratman, 4 Mo. App. 41; Holladay *v.* Patterson, 5 Oregon 177; Holladay *v.* Davis, 5 Oregon 40.

for if the purchase is openly, honestly and fairly made with the full knowledge of the corporation, we can see no reason why it may not be enforced, but if there be any concealment, fraud or deception, the director should not at the utmost be allowed to recover anything more than the amount actually paid for the claims.[1] Directors have no general right to loan the credit of the company, or to issue mere accommodation paper in the name of the company, where no consideration is yielded the company,[2] except in cases where the act of incorporation empowers them to do so, or, perhaps, where from long usage the power may be inferred. Contracts entered into by directors prejudicial to corporate interests, or for the sole purpose of enabling them to retain control of the corporate affairs, are voidable.[3] Directors can not, of course, enter into combinations with other persons for the purpose of securing to such persons or themselves a gain, profit or advantage at the expense of the corporation.[4] It is a familiar rule, illustrated by cases much too numerous for citation, that all dealings between directors and the corporations are scrutinized with great care and avoided, if there be any undue advantage taken by the directors, or any concealment or deception, and this general rule applies to dealings between two

[1] Analagous cases sustain the statement of the text. Smith *v.* Lansing, 22 N.Y. 520; Ashurst's Appeal, 60 Pa. St. 290; Chester *v.* Dickerson, 54 N. Y. 1; Getty *v.* Devlin, 54 N. Y. 403. Seymour *v.* Spring Forest, etc., Assn., 144 N. Y. 333, s. c. 39 N. E. R. 365, holds, and, as we think, correctly, that there are cases in which evidences of corporate indebtedness may be bought by directors.

[2] Hutchinson *v.* Sutton, etc., Co., 57 Fed. R. 998.

[3] Northern, etc., Co. *v.* Concord R. Co., 50 N. H. 166; Bliss *v.* Matteson, 45 N. Y. 22.

[4] Jackson *v.* Ludeling, 21 Wall. 616; Nelson *v.* Luling, 62 N. Y. 645. See, generally, Drury *v.* Cross, 7 Wall 299; Cook *v.* Berlin, etc., Mill Co., 43 Wis. 433; Fuller *v.* Dame, 18 Pick. 472; Stark Bank *v.* United States, etc., Co., 34 Vt. 144; Andrews *v.* Pratt, 44 Cal. 309; City of San Diego *v.* San Diego, etc., R. Co., 44 Cal. 106; Richardson *v.* Green, 133 U. S. 30; McMurtry *v.* Montgomery, etc., Co., 86 Ky. 206; Duncomb *v.* New York, etc., Co., 88 N. Y. 1; Twin Lick, etc., Co. *v.* Marbury, 91 U. S. 587; Harts *v.* Brown, 77 Ill. 226; Boerum *v.* Schenck, 41 N. Y. 182; Hoyle *v.* Pittsburg, etc., Co., 54 N. Y. 314.

corporations in cases where the directors of one are also directors of the other.[1]

§ 276. **Directors—Dealings with corporation.**—Directors are not, under all circumstances, prohibited from dealing with the company of which they are the representatives. If there is entire good faith and no taint of fraud, a transaction with the company will generally be sustained.[2] Contracts made by a director with the company, which upon close scrutiny appear to be entirely fair, open and honest, will be upheld by the courts.[3] The weight of authority is that such contracts are not void, nor even voidable,[4] although there is conflict of authority. It is held by some of the courts that, while executory, such contracts are voidable at the instance of the corporation,[5] or of a dissenting stockholder.[6] Contracts with directors may, as a

[1] Paine *v.* Lake Erie, etc., Co., 31 Ind. 283; Polar Star Lodge *v.* Polar Star Lodge, 13 La. Ann. 76; Abbot *v.* American, etc., Co., 33 Barb. 578.

[2] Wardell *v.* Railroad Co., 103 U. S. 651; Ryan *v.* Railroad Co., 21 Kan. 365; Koehler *v.* Iron Co., 2 Black. 715; Michoud *v.* Girod, 4 How. (U. S.) 502; Hotel Co. *v.* Wade, 97 U. S. 13; Van Cott *v.* Van Brunt, 82 N. Y. 535; Densmore Oil Co. *v.* Densmore, 64 Pa. St. 43. See Bristol, etc., Co. *v.* Probasco, 64 Ind. 406; Greensboro, etc., Co. *v.* Stratton, 120 Ind. 294; Ward *v.* Polk, 70 Ind. 309; Rogers *v.* Hastings R. Co., 22 Minn. 25; Santa Clara, etc., Co. *v.* Meredith, 49 Md. 389; Chandler *v.* Monmouth Bank, 1 Green (N. J.) 255; Shackelford *v.* New Orleans, etc., R. Co., 37 Miss. 202; New Orleans, etc., Co. *v.* Brown, 36 La. Ann. 138; Cheeney *v.* Lafayette, etc., R. Co., 68 Ill. 570; Henry *v.* Rutland, etc., R. Co., 27 Vt. 435. But contracts with a director must be entirely free from fraud. Parker *v.* Nickerson, 137 Mass. 487; Hotel Co. *v.* Wade, 97 U. S. 13.

[3] European, etc., R. Co. *v.* Poor, 59 Me. 277; Stark Bank *v.* U. S. Pottery Co., 34 Vt. 144; Ashurst's Appeal, 60 Pa. St. 290.

[4] Claflin *v.* South Carolina R. Co., 8 Fed. R. 118; Sims *v.* Street R. Co., 37 Ohio St. 556; Central, etc., Railroad Co. *v.* Claghorn, 1 Speers' Eq. (S. C.) 546; Stratton *v.* Allen, 16 N. J. Eq. 229; Hallam *v.* Indianola Hotel Co., 56 Iowa 178; Stewart *v.* St. Louis, etc., Co., 41 Fed. R. 736.

[5] Munson *v.* Syracuse, etc., R. Co., 103 N. Y. 58; Aberdeen R. Co. *v.* Blakie, 1 Macq. 461.

[6] Ward *v.* Salem St. Railway, 108 Mass. 332; Flint, etc., R. Co. *v.* Dewey, 14 Mich. 477; York, etc., R. Co. *v.* Hudson, 16 Beav. 485; Wardell *v.* Railroad Co., 103 U. S. 651; Little Rock, etc., R. Co. *v.* Page, 35 Ark. 304; Houston, etc., R. Co. *v.* Van Alstyne, 56 Tex. 439; Duncomb *v.* New York, etc., R. Co., 84 N. Y. 190. Where there was no fraud a sale by a director of property to a corporation, which is approved by the board of directors and ratified by the stockholders, will not be held invalid simply because the sale was made for a sum greatly in excess of the cost of the property

rule, be set aside upon very slight grounds, at the suit of any one injured thereby.[1] Some of the cases hold that voidable contracts with a director may be ratified by acquiescence.[2] It is also held that if the director has done anything toward executing the contract, it can not be avoided by the corporation without restoration to him of what the corporation received under it.[3] Where they act in entire good faith, and the transaction is open and fair, directors may purchase the corporate property.[4] It has been adjudged that they may even purchase the corporate indebtedness, and enforce a judicial sale of the property

to the director. Stewart *v.* St. Louis, Ft. S. & W. R. Co., 41 Fed. R. 736. In the case cited the court said, speaking of the directors, that "When the sale to the company was made they did hold a position of trust, and were bound in their official action to faithfully and honestly execute their duties, and not to make a deal where their personal interest should be served at the expense of the company they represented."

[1] Twin Lick Oil Co. *v.* Marbury, 91 U. S. 587, and numerous cases cited. It is held that a purchase by a corporation will not be set aside because of the interest of one of the directors, where the complaining stockholder has suffered no damage. Hill *v.* Nisbet, 100 Ind. 341. A contract made by the directors with two of their number, when only four were present, is invalid. Alling *v.* Wenzell, 27 Ill. App. 511.

[2] Kelley *v.* Newburyport, etc., R. Co., 141 Mass. 496; Union Pac. R. Co. *v.* Credit Mobilier, 135 Mass. 367; Ashurst's Appeal, 60 Pa. St. 290. Generally a party who seeks to avoid a voidable contract must act with promptness. Seymour *v.* Spring Forest Cemetery Ass'n, 144 N. Y. 333, s. c. 39 N. E. R. 365.

[3] Duncomb *v.* New York, etc., R. Co., 84 N. Y. 190, 88 N. Y. 1. If the officers, directors and stockholders consent to a contract between the corporation and a director and keep the property thus acquired, the contract will not be voidable merely because made with a director. Battelle *v.* Northwestern Cement & Concrete Pavement Co., 37 Minn. 89, 33 N. W. Rep. 327.

[4] Ellis *v.* Boston, etc., R. Co., 107 Mass. 1; Kitchen *v.* St. Louis, etc., R. Co., 69 Mo. 224; Buell *v.* Buckingham, 16 Iowa 284. See Hoyle *v.* Plattsburgh, etc., R. Co., 54 N. Y. 314. A purchase by a director of a corporation, without an order of the board of directors, of property of the corporation in satisfaction of his own debt, is ratified if the corporation takes up, cancels and retains the notes held by him. Beach *v.* Miller, 130 Ill. 162, 28 Am. & Eng. Corp. Cas. 468, 22 N. E. 464. But in order that such a transaction may repel an assault by a stockholder or creditor prejudiced thereby it must be entirely free from fraud. Courts are reluctant to permit the purchase of corporate property by any of the corporate officers and scrutinize such transactions very carefully. Slade *v.* Van Vechten, 11 Paige 21; Munson *v.* Syracuse, etc., Co., 103 N. Y. 50, s. c. 8 N. E. R. 355.

to themselves, if they have acted in good faith and given the stockholders a full opportunity to make advances to relieve the corporation from embarrassment, and they have refused to do so.[1] Where a director has necessarily expended money in good faith for the corporation, he is entitled to be reimbursed.[2] So a director may loan money to the corporation, where it is needed for its benefit, if he act fairly and openly, and may purchase the corporate property at a public sale, under a trust deed given to secure it.[3] Directors acting in good faith are in many cases entitled to the same rights as other creditors.[4] But in making purchases or sales for the corporation, they can not directly or indirectly speculate, to the injury of the company, for their own advantage.[5] It is held that contracts with railroad directors, whereby they undertake, for a compensation given to themselves, to alter or establish their road, depots or works so as to promote private interests, are void, as contraven-

[1] Harts *v.* Brown, 77 Ill. 226. But he can neither buy nor sell against the wish of the corporation or the stockholders, excepting by judicial process in pursuance of a fair contract made with their approbation, since he is a trustee, and no trustee can purchase of himself nor sell to himself over the objections of his *cestui que trust*. Pearson *v.* Concord R. Co., 62 N. H. 537, and numerous cases cited.

[2] Rogers *v.* Hastings, 22 Minn. 25; Missouri R. Co. *v.* Richards, 8 Kan. 101. Delivery of corporate stock and execution of a mortgage on corporate property by a board of directors, in payment of corporate indebtedness, is not rendered void by the fact that several directors became guarantors for further advances to the corporation after its credit had been exhausted, and which were to be paid by the delivery of the stock. County Court of Taylor County *v.* Baltimore & O. R. Co., 35 Fed. R. 161.

[3] Saltmash *v.* Spaulding, 147 Mass. 224; Twin Lick Oil Co. *v.* Marbury, 91 U. S. 587. But if he attempts to take an undue advantage, his mortgage can not be enforced. Sutter St. R. Co. *v.* Baum, 66 Cal. 44. A director of a railroad may properly own its bonds and may enforce payment in case of default by foreclosure. Duncomb *v.* New York, etc., R. Co., 84 N. Y. 190, 88 N. Y. 1; Harpending *v.* Munson, 91 N. Y. 650. An officer or agent of the corporation, capable of becoming its creditor, may enforce the liability of creditors notwithstanding his relation to the corporation. Hall *v.* Klinck, 25 S. C. 348, 60 Am. R. 505.

[4] Claflin *v.* South Carolina R. Co., 8 Fed. R. (4 Hughes 12) 118. A stockholder, and even a director, may become a creditor of a corporation in absence of fraud. Borland *v.* Haven, (C. C. N. D. Cal.), 37 Fed. Rep. 394.

[5] Manufacturers' Sav. Bank *v.* Big Muddy Iron Co., 97 Mo. 38; Port *v.* Russell, 36 Ind. 60; Wayne Pike Co. *v.* Hammons, 129 Ind. 368.

ing public policy.[1] Such cases belong to the class which equity writers characterize as cases of constructive fraud.

§ 277. **Directors—Termination of fiduciary relations.**—The fiduciary relation may, of course, be terminated by resignation, removal from office, or the like. It may also be terminated by operation of law. So, too, conditions may so change as to sever the relation and leave the director as free to act as if the relation had never existed.[2]

§ 278. **Directors—Liability of—Generally.**—In considering the personal liability of directors, it is important to keep in mind the distinction, heretofore mentioned, between the duties of the directors to the corporation and its share holders, and their duties to third persons.[3] As to the corporation they are, as we have said, trustees, but as to third persons they are not trustees, simply because of their official relation to the corporation and its stockholders, although they may doubtless become such in particular instances.[4] Where there is a breach of duty in the discharge of duties owing to the corporation there is a breach of trust, but as to third persons a breach of duty is not always a breach of trust. From the doctrine that there is an essential difference between the duty to the corporation and the duty to third persons, consequences of importance result. It is obvious that there may be a liability to the

[1] Union Pac. R. Co. *v.* Durant, 1 Cent. L. J. 581; Pacific R. Co. *v.* Seely, 45 Mo. 212; Bestor *v.* Wathen, 60 Ill. 138. It is the duty of a director to manage the corporate business for the profit of the stockholders, and he can not so deal with its property as to make profit for himself. Schetter *v.* Southern Oregon Co., 19 Ore. 192, 24 Pac. 25; Pearson *v.* Concord R. Corp., 62 N. H. 537, 13 Am. St. R. 590; Hart *v.* Brockway, 57 Mich. 189, 23 N. W. 725.

[2] The entire plant and assets of a corporation, having been sold under an assignment for the benefit of creditors, a stockholder, who was a director and the treasurer of the corporation, is no longer a trustee or in any fiduciary relation to the corporation, which will prevent him from taking an assignment to himself of corporate debts, which he has paid personally, and participating with the other creditors in the distribution of the fund. Hammond's Appeal, 123 Pa. St. 503.

[3] *Ante*, § 273; Briggs *v.* Spaulding, 141 U. S. 132, s. c. 11 Sup. Ct. R. 924.

[4] Wilkinson *v.* Bauerle, 41 N. J. Eq. 635; See Loverin *v.* McLaughlin, (Ill.) 44 N. E. 99.

corporation or stockholders, where there would be none to third persons, and that the evidence required in the one class of cases is very different from that required in the other class. So, too, the duty in the one class of cases is stricter than in the other, and the obligation to exercise good faith much higher. Some of the cases discriminate between officers to whom compensation is paid, and those who receive no pay for their services,[1] but where persons undertake to serve a business corporation, such as a railway company, it seems to us they are under an obligation to the corporation and stockholders, to exercise at least ordinary care and diligence, whether their services are or are not paid for by the corporation. It is no doubt true that in determining whether ordinary care and diligence has been exercised, it is proper to consider the time and attention that directors are, under the circumstances of the particular case, bound to give the corporate affairs, but this does not lead to the conclusion that the directors may be guilty of negligence, and, nevertheless, be exonerated from liability, for the failure to exercise ordinary care and diligence is negligence. Whether ordinary care and diligence has been exercised must usually, but not always, be a question of fact to be determined by the jury, under the instructions of the court.[2]

[1] Austin *v.* Daniels, 4 Denio 299; Commercial Bank *v.* Ten Eyck, 48 N. Y. 305; East New York, etc., Co. *v.* Elmore, 5 Hun 214; Pangborn *v.* Citizens', etc., Assn., 35 N. J. Eq. 341; First National Bank *v.* Reed, 36 Mich. 263; Beach on Railways, § 486; Taylor on Corporations (3d ed.), § 618.

[2] Spering's Appeal, 71 Pa. St. 11, s. c. 10 Am. R. 684; Hun *v.* Cary, 82 N. Y. 65, s. c. 37 Am. R. 546, citing Scott *v.* De Peyster, 1 Edw. Ch. 513, 543; Hodges *v.* New England, etc., Co., 1 R. I. 312; Liquidators, etc., *v.* Douglas, 22 Sess. Cases (2d series) (Scotch), 447, s. c. 32 Scotch Jur. 212; Charitable Corporation *v.* Sutton, 2 Atk. 405; Litchfield *v.* White, 7 N. Y. 438. It seems to us that there is an essential difference between cases where persons serve as directors of a charitable corporation and cases where they assume the duties of directors of a business corporation. In accepting the position of director of a business corporation men do so knowing that corporate affairs require time and attention as well as the exercise of reasonable business care and diligence, and they, therefore, impliedly, at least, undertake to exercise that diligence and care. In regard to corporate affairs as well as in all other matters the question of negligence or no negligence must, in a very great measure, depend upon the facts of the particular case. First National Bank *v.* Ocean National Bank, 60 N. Y. 278,

It may be said, by the way, that it is only just and natural that officers who are paid for devoting their time and attention to the corporate affairs, should be held to a higher degree of care and diligence, than those who serve without compensation, or those who undertake to give only a part of their time and services to the corporation, but this does not authorize the conclusion that any corporate officer, whether paid or not paid for his services, may neglect the duties he has assumed, and yet not be held liable for the consequences of his negligence. The effect to be ascribed to the fact that no compensation is paid is that it is in all cases an important factor in determining whether ordinary diligence was exercised, and in many cases a controlling one.

§ 279. **Directors—Liability in matter of contract.**— Substantially the same rules that apply to corporate officers and agents generally, respecting personal liability in matters of contract, govern cases where a personal liability is sought to be imposed upon the directors of a railroad company. The familiar general rule is that where an officer or agent enters into a contract for the corporation, in its name and by its authority, his principal alone is bound and he incurs no personal liability. If the agent exceeds his authority he may incur a personal liability. So, if an agent executes the contract in his own name he may be bound to the person with whom he contracts.[1] The general doctrine is that directors, so long as they act within the scope of their powers, bind the corporation and it alone; yet their acts done in excess of such powers may in some cases bind them personally.[2] As we have elsewhere said, directors are not liable for the consequences of mistakes which they may make, however gross, so long as they act in good faith and with reasonable care,[3] and keep within

s. c. 19 Am. R. 181, and authorities cited.

[1] Vincent *v.* Chapman, 10 Gill & J. (Md.) 279; Mott *v.* Hicks, 1 Cowen (N. Y.) 513; Johnson *v.* Gibson, 78 Ind. 282.

[2] Smith *v.* Poor, 3 Ware (U. S.) 148; Land Credit Co. *v.* Lord Fermoy, L. R. 8 Eq. 7. See, also, *In re* International Contract Co., L. R. 6 Ch. App. 525; *In re* County Palatine Loan and Discount Co., L. R. 9 Ch. App. 691.

[3] As where they are misled by counsel whom they have employed. Sper-

the scope of their powers.[1] It is often said that the directors are liable for any loss resulting from their acts if they exceed or abuse their powers; but this is, perhaps, rather a broad statement of the rule and is not to be taken without some qualification.[2]

§ 280. **Directors — Errors of judgment.**—Where directors act in good faith and with reasonable care and diligence, not going beyond the scope of their authority, they are not personally liable for losses that may occur although they may not have wisely exercised their discretion or may have erred in judgment. They are required to act in good faith and to exercise reasonable care and diligence, but their duty imposes upon them no higher or greater obligations. Mistake of judgment or bad business management is not of itself sufficient to create a personal liability.[3]

§ 281. **Directors — Liability for negligence.**—We have else-

ing's Appeal, 71 Pa. St. 11; Van Dyck *v.* McQuade, 86 N. Y. 38. The measure of care and diligence required of the directors of a corporation is generally such as a prudent man exercises in his own affairs, but must be determined in each case in view of all the circumstances. Horn Silver Min. Co. *v.* Ryan, 42 Minn. 196, s. c. 28 A. & E. Corp. Cas. 657, 44 N. W. R. 56.

[1] Percy *v.* Millaudon, 8 Martin N. S. (La.) 68; Hodges *v.* New England Co., 3 R. I. 9; Dunn *v.* Kyle, 14 Bush. (Ky.) 134; Vance *v.* Phœnix Ins. Co., 4 Lea (Tenn.) 385.

[2] National Exchange Bank *v.* Sibley, 71 Ga. 726; Cole *v.* Cassidy, 138 Mass. 437; Paddock *v.* Fletcher, 42 Vt. 389; Morgan *v.* Skiddy, 62 N. Y. 319. Directors who vote for a resolution to illegally issue and negotiate notes of the corporation, incur a personal liability to the corporation where such notes come into the hands of *bona fide* purchasers. Metropolitan Elev. R. Co. *v.* Kneeland, 120 N. Y. 134, s. c. 8 L. R. A. 253. Directors of a company which has received the assets of another company and has assumed its debts, who misapply the assets of the old company, thereby render themselves individually liable to its creditors. Nat. Bank of Jefferson *v.* Texas Invest. Co., 74 Tex. 421, s. c. 12 S. W. R. 101.

[3] Hun *v.* Cary, 82 N. Y. 65, s. c. 37 Am. R. 546; Excelsior, etc., Co. *v.* Lacey, 63 N. Y. 422; Spering's Appeal, 71 Pa. St. 11, s. c. 10 Am. R. 684; Overend *v.* Gurney, L. R. 4 Ch. 701; Overend *v.* Gibb, L. R. 5 H. L. 480; Turquand *v.* Marshall, L. R. 4 Ch. 376; Vance *v.* Phœnix, etc., Co., 4 Lea (Tenn.) 385; Godbold *v.* Branch Bank, etc., 11 Ala. 191, s. c. 46 Am. Dec. 211; Citizens', etc., Assn. *v.* Coriell, 34 N. J. Eq. 383; Charitable Corporation *v.* Sutton, 2 Atk. 400; Percy *v.* Millaudon, 8 Mart. N. S. (La.) 68.

where said that directors are bound to exercise ordinary or reasonable care and diligence in the discharge of their duties; that the failure to do so is negligence, but that what shall be deemed negligence depends, as a rule, upon the facts of the particular case. At this place our purpose is to direct attention to some of the cases enforcing and applying the doctrines stated. A director is personally liable for any acts of the board of which he is a member constituting culpable negligence,[1] or amounting to a fraudulent breach of trust,[2] unless he can show that he sought to prevent such action, if present when the action was taken,[3] or that he labored to avert its injurious consequences after it came to his knowledge.[4]

§ 282. **Directors—Fraud on third persons.**—Directors who make false and fraudulent representations of fact, thereby causing loss to innocent third persons who act upon the faith of the truth of the representations, are personally liable to such persons.[5] It is essential to a recovery in such cases that it be

[1] Beal *v.* Osborne, 72 Cal. 305; Myer *v.* Caperton, 87 Ky. 306; Cady *v.* Sanford, 53 Vt. 632; Spering's Appeal, 71 Pa. St. 11. Directors of a corporation are personally liable for permitting the corporate funds or property to be wasted or lost by inexcusable negligence or inattention to the duties they assume in accepting the office of director. Horn Silver Min. Co. *v.* Ryan, 42 Minn. 196, 28 Am. & Eng. Corp. Cas. 657, 44 N. W. 56.

[2] Sims *v.* Street R. Co., 37 Ohio St. 556; Colquitt *v.* Howard, 11 Ga. 556; Smith *v.* Poor, 40 Me. 415; Hazard *v.* Durant, 11 R. I. 195.

[3] Unless, being present through only part of the session, he had no knowledge of the facts. Land Credit Co. *v.* Fermoy, L. R. 5 Ch. 763.

[4] Metropolitan R. Co. *v.* Kneeland, 120 N. Y. 134; Black *v.* Delaware, etc., Canal Co., 22 N. J. Eq. 130, 420; Percy *v.* Millaudon, 3 La. 568; Shea *v.* Mabry, 1 Lea (Tenn.) 319.

[5] Prescott *v.* Haughey, 65 Fed. R. 653. In the case cited, Baker, J., delivered a strong and well reasoned opinion, in the course of which it was said: "The fraudulent representations charged in the complaint, if made under color of their office, were entirely outside of the official duties of the directors. Neither the law, nor the obligations of their office made it any part of their duty to utter and publish false and fraudulent statements and reports in regard to the condition of the bank. The tort for which they are sued was committed in their private and personal capacity, because the law does not confer upon such officers any authority to commit frauds of the character complained of. These directors have used their official position to enable them to perpetrate

proved by the plaintiff that the representations were false. But it is held, with good reason and upon authority, that it is not necessary that the plaintiff should show that the representations were made with intent to defraud.[1] The representations may be made in various forms. The form in which they are made is not regarded as material, for if they were made and did result in defrauding a right-doing third person he is entitled to recover. The question has arisen in many forms; thus, where the directors knowingly issued fraudulent stock or bonds, they were held to be individually liable to any purchaser or subsequent transferee in good faith and without notice of the fraudulent character of the stock or bonds.[2] So, the making of false and fraudulent statements as to the value of the stock or condition of the business of the corporation, or other matters peculiarly within their knowledge,[3] will render the directors liable to the parties to whom they were made and who acted upon them for all damages which they sustain thereby. Actionable false and fraudulent representations may be made in a prospectus[4] or report[5] officially issued, and, as a general rule, all persons

a fraud on the plaintiff entirely outside of the legitimate scope of their duties." The court discriminated between the case before it for judgment and that of Bailey *v.* Mosher, 11 C. C. A. 304, s. c. 63 Fed. R. 488.

[1] Seale *v.* Baker, 70 Texas 283, s. c. 7 S. W. R. 742.

[2] Hornblower *v.* Crandall, 78 Mo. 581; Bruff *v.* Mali, 36 N. Y. 200; National Exch. Bank *v.* Sibley, 71 Ga. 726. Acts 16th Gen. Assem. Iowa, c. 123, § 6, provides that if the directors of any railroad of three-feet gauge receiving taxes voted in aid thereof under the act shall vote to mortgage or incumber the road for more than $16,000 per mile, they, or those voting in the affirmative, shall be liable to each stockholder in an amount double the par value of his stock, if the stock is rendered less valuable thereby. Under this statute it was held that persons receiving shares for taxes voted and paid after a mortgage for more than $16,000 per mile had been executed and recorded could not recover against the directors who voted the same. Walker *v.* Birchard, 82 Iowa 388, 48 N. W. 71.

[3] If the statements be as to matters of law and mere opinion, the directors are not bound. New Brunswick, etc., R. Co. *v.* Conybear, 9 H. L. Cas. 711; Rashdall *v.* Ford, L. R. 2 Eq. 750; Morgan *v.* Skiddy, 62 N. Y. 319.

[4] Morgan *v.* Skiddy, 62 N. Y. 319; United Society *v.* Underwood, 9 Bush. (Ky.) 609.

[5] Salmon *v.* Richardson, 30 Conn. 360; Warren *v.* Para, etc., Co., (Mass.) 44 N. E. R. 112.

into whose hands such prospectus or statement may come, have a right to rely upon them and to hold the directors personally responsible for losses sustained by reason of acting upon a belief in their truth.[1] As a general rule only those directors who participated in the fraud are personally liable,[2] and to entitle a plaintiff to recover, such participation or at least knowledge and acquiescence therein must be proved,[3] since the court will not, in the absence of evidence, indulge the presumption that a director knows of the frauds of his associates. The authorities are numerous upon the general question and support the general statement of the opening sentence of this section.[4] In many of the states the directors are by statute made personally liable for corporate debts created beyond their subscribed capital stock,[5] and are also made liable for debts in case they declare and pay dividends unlawfully.[6] The making of a

[1] Peek *v.* Gurney, L. R. 6. H. L. 377; Vreeland *v.* N. J. Stone Co., 29 N. J. Eq. 188. The rule stated would not apply if the persons into whose hands such instruments came knew that the statements were not true, or if they were guilty of such negligence as would, under the ordinary rules of law, prevent a recovery for a loss caused by fraudulent representations.

[2] Cargill *v.* Bower, L. R. 10 Ch. Div. 502.

[3] Arthur *v.* Griswold, 55 N. Y. 400.

[4] United Society *v.* Underwood, 9 Bush. 609; Graves *v.* Bank, 10 Bush. 23; Bartholomew *v.* Bentley, 15 Ohio 659; Cross *v.* Sackett, 6 Abb. Pr. R. 247; Cazeaux *v.* Mali, 25 Barb. 578; Morgan *v.* Skiddy, 62 N. Y. 319; Johnson *v.* Gorlett, 3 C. B. (N. S.) 569; Clarke *v.* Dickson, 6 C. B. (N. S.) 452; Peek *v.* Derry, L. R. 37 Ch. Div. 541, 585; Delano *v.* Case, 121 Ill. 247, s. c. 12 N. E. R. 676; Neall *v.* Hill, 16 Cal. 145; Marshall *v.* Bank, 85 Va. 676, s. c. 8 S. E. R. 586; Wallace *v.* Bank, 89 Tenn. 630, s. c. 15 S. W. R. 448; Salmon *v.* Richardson, 30 Conn. 360, s. c. 79 Am. Dec. 255; Morawetz on Corp., § 573; Taylor on Corp., § 616; Cooley on Torts (2d ed.), 578, 579. See, generally, Clark *v.* Edgar, 84 Mo. 106, s. c. 54 Am. Rep. 84; Nat. Exchange Bank *v.* Sibley, 71 Ga. 726; Peck *v.* Cooper, 112 Ill. 192, s. c. 54 Am. R. 231; City of Wyandotte *v.* Corrigan, 35 Kan. 21; Peek *v.* Gurney, Law R. 6 H. L. 377.

[5] Stimson's Am. Stat. (1892), § 8232; Cal. Civ. Code, § 309, making directors of corporations individually liable for debts created beyond their subscribed capital stock, was held applicable to all the subscribed capital stocks, irrespective of the mode of disposition, and whether paid in or not. But the debts referred to did not include capital stock paid for corporate property. Moore *v.* Lent, 81 Cal. 502, 22 Pac. 875.

[6] Stimson's Am. Stat. (1892), §§ 8161, 8634. Other states make the directors liable to a penalty. Stimson's Am. Stat. (1892), §§ 8161, 8634.

report as to the business and financial condition of a railroad corporation which is false in any material representation renders the officers signing it liable for all debts of the corportion contracted while they are such officers thereof in Arkansas, Texas and Nevada; and renders them liable to a penalty in Michigan; and making such a report is a misdemeanor in Nevada and Minnesota.[1]

[1] Stimson's Am. Stat. (1892), § 8544. See Niles *v.* Dodge, 70 Ind. 147; State *v.* Cox, 88 Ind. 254. Fairbanks, etc., Co. *v.* Macleod, (Colo.) 45 Pac. R. 282; Lehman *v.* Knapp, (La.) 20 So. R. 674. See, generally, Stone *v.* Kellogg, 62 Ill. App. 444; Rose *v.* Eclipse, etc., Co., 60 Mo. App. 28; Greenville, etc., Co. *v.* Reis, (Ohio) 44 N. E. R. 271; Solomon *v.* Bates, (N. C.) 24 S. E. R. 478. Rights of directors under statutes preferring claims of laborers. Consolidated, etc., Co. *v.* Keystone, etc., Co., (N. J.) 35 Atl. R. 157. As to who are proper parties where the right to the office of director is involved, see, Dusenbury *v.* Looker, (Mich.) 67 N. W. R. 986.

CHAPTER XIII.

EXECUTIVE AND MINISTERIAL OFFICERS AND AGENTS.

§ 283. President—Generally.
284. President—Incidental powers of.
285. President—Implied powers.
286. President—Powers implied from grant of authority by the board of directors.
287. President—Influence of usage.
288. President—Apparent authority.
289. President—Ratification of unauthorized acts.
290. President—Dealings with corporation.
291. President—Relation to shareholders.
292. Treasurer—Generally.
§ 293. Treasurer—Duties—Liabilities.
294. Treasurer—Care of corporate funds.
295. Secretary.
296. Managing agents.
297. Superintendent.
298. Superintendent—General conclusion.
299. Intermediate agents.
300. Intermediate agents—Agent for one purpose not for another.
301. Intermediate agents and servants distinguished.
302. Conductors.
303. Station agents.

§ 283. **President—Generally.**—Railroad companies are generally required to elect a president,[1] who is, ordinarily, the chief executive officer of the company.[2] It can hardly be said that the powers and duties of a president of a railway company are prescribed and defined by the general principles of law, for, as a rule, recourse must be had to the act of incorpora-

[1] The president must be chosen by the body to which the act of incorporation grants the right to elect. An election by the stockholders, where the charter requires the board of directors to elect, is a nullity. Walsenburg, etc., Co. *v.* Moore, 5 Colo. App. 144, 38 Pac. R. 60.

[2] Provision is often made for the election of a vice-president, but, as a rule, he only acts in the absence of the president, although active, independent duties may be required of him, if the company so desires, and no provision of the charter forbids. Colman *v.* West Virginia, etc., Co., 25 W. Va. 148; Chicago, etc., Co. *v.* James, 22 Wis. 194; Chicago, etc., Co. *v.* James, 24 Wis. 388; Richards *v.* Osceola, 79 Iowa 707.

tion or to the corporate by-laws to ascertain what these powers and duties are. Some of the cases hold that he has no greater powers by virtue of his office than any other director except that he is the presiding officer at the meetings of the board of directors.[1] It seems to us, however, that the powers of the president are greater and more comprehensive than those of an individual director for he may act for the company in ordinary business affairs and this an individual director can not do ; but the president can not, of course, effectively exercise powers which belong to the board of directors. We think it may be safely said that in ordinary routine business matters the president may act for the company unless his powers are so circumscribed and limited by the act of incorporation or the corporate by-laws as to exclude the operation of the general rules of law. We know that the authorities are in conflict upon this question, but we believe that the trend of modern authority is strongly in favor of the conclusion we have stated. Some of the decisions contain loose general statements that can not justly be regarded as authoritative, but must be taken to be mere *dicta*. There is, however, a sharp conflict which it is not possible to reconcile.[2] While the president may, as we

[1] Dabney *v.* Stevens, 10 Abb. Pr. (N. S.) 39; Adriance *v.* Roome, 52 Barb. 399; Risley *v.* Indianapolis, etc., 1 Hun. 202. See, generally, Chicago, etc., Co. *v.* James, 22 Wis. 194; Hodges *v.* Rutland, etc., 29 Vt. 220; Bacon *v.* Mississippi, etc., Co., 31 Miss. 116; Templen *v.* Chicago, etc., Co., 73 Iowa 548, s. c. 34 Am. & Eng. R. Cas. 107.

[2] Sustaining the doctrine of the text. Sherman, etc., Co. *v.* Swigart, 43 Kan. 292, s. c. 19 Am. St. R. 137; Mitchell *v.* Deeds, 49 Ill. 416, s. c. 95 Am. Dec. 621; Washburn *v.* Nashville, etc., Co., 3 Head. 638, s. c. 75 Am. Dec. 784; Chicago, etc., Co. *v.* Coleman, 18 Ill. 297, s. c. 68 Am. Dec. 544; Blen *v.* Bear River, etc., Co., 20 Cal. 602; Ceeder *v.* Loud, etc., Co., 86 Mich. 541, s. c. 24 Am. St. R. 134; Oakes *v.* Cattaragus, etc., Co., 143 N. Y. 430, s. c. 26 L. R. A. 544; Thomas *v.* City, etc., Bank, 40 Neb. 501, s. c. 24 L. R. A. 263; Los Angeles, etc., Co. *v.* City of Los Angeles, 106 Cal. 156, s. c. 39 Pac. R. 535; Hawley *v.* Gray Bros., etc., Co., 106 Cal. 337, s. c. 39 Pac. R. 609; Gray *v.* Waldron, 101 Mich. 612 s. c. 60 N. W. R. 288. *Contra*, Lyndon, etc., Co. *v.* Lyndon, etc., Inst., 63 Vt. 581, s. c. 25 Am. St. R. 783; Wait *v.* Nashua, etc., Association, (N. H.) 23 Atl. R. 77, 34 Cent. L. J. 119, 14 L. R. A. 356; Mount Sterling, etc., Co. *v.* Looney, 1 Metc. (Ky.) 550, s. c. 71 Am. Dec. 491; Brooklyn, etc., Co. *v.* Slaughter, 33 Ind. 185. A valuable article, rich in authority, by Judge Seymour D. Thompson, in 39 Cent. L. J. 200, presents both sides of the

believe, act for the corporation in ordinary matters of routine business he is not the corporation.[1] He can not perform the duties of the board of directors, nor can he perform those conferred upon other corporate officers by the act of incorporation or the by-laws, neither can he effectively perform acts outside of the ordinary business affairs or transactions of the company.[2]

§ 284. **President — Incidental powers of.**—As indicated in the preceding section our opinion is that the president of a railroad company possesses incidental powers of considerable scope in all cases, except, perhaps, in those where the act of incorporation or the by-laws so clearly and fully prescribe and define his powers as to exclude all implied power. The rule applied to charitable corporations can not, it seems to us, be applied to railway companies, so that the cases laying down the law as to the powers of the president of educational, literary, benevolent corporations, or the like, ought not to be unqualifiedly accepted as authoritatively declaring the law applicable to the presidents of railroad companies. Judges know *ex officio* that in the conduct and management of railway companies there are matters requiring daily attention and that of those matters disposition must be made promptly and effectively without calling together the board of directors for formal action. So, too, it is a matter of judicial knowledge that railroad companies are often consolidated, that interests of great magnitude are combined, that many miles of railroad are placed under one management, and that directors often reside far apart and far distant from the principal office. In

question very fully. Copious notes will be found in Wait *v.* Nashua, etc., Assn., 14 L. R. A. 256, and in Templen *v.* Chicago, etc., 73 Iowa 548, 34 Am. & Eng. R. Cas. 107.

[1] Bi-Spool, etc., Co. *v.* Acme, etc., Co., 153 Mass. 404.

[2] Blen *v.* Bear River, etc., Co., 20 Cal. 602; Siebe *v.* Joshua, etc., Co., 86 Cal. 390; Castle *v.* Belfast, etc., Co., 72 Me. 167; Risley *v.* Indianapolis, etc., Co., 1 Hun 202; Walworth County Bank *v.* Farmers', etc., Co., 14 Wis. 325; Crump *v.* United States, etc., Co., 7 Gratt. 352, s. c. 56 Am. Dec. 116; Bliss *v.* Kaweah, etc., Co., 65 Cal. 502; Leggett *v.* New Jersey, etc., Co., 1 N. J. Eq. 541. The doctrine is carried very far in the case of Asher *v.* Sutton, 31 Kan. 286.

view of these considerations, and others which might be suggested, it is but reasonable and natural to hold that in many respects the powers of the chief executive or ministerial officers of a railroad company are more comprehensive than those of a corporation of a different nature, such as a manufacturing, mining or banking company, although in other repects, as borrowing the money, or the like, they are not so comprehensive as those of a president of a corporation of that class. It is safe, at all events, to affirm that the president of a railroad company does possess implied or incidental powers and that his powers extend beyond those expressly conferred upon him by the board of directors. He may do many acts without direct or express authority from the board of directors of the company.

§ 285. **President — Implied powers.**— It is difficult in some cases to determine what powers the president possesses as incident to the office bestowed upon him, or as implied from the general nature of the authority conferred upon him by the company. A contract of an unusual character, as, for instance, a contract for the construction of the road, he has no implied power to make, since that is a contract of an extraordinary character, at least it is one beyond the range of ordinary corporate business.[1] He can not rightfully sell all the personal property of the corporation, nor, perhaps, any very considerable part of it unless authorized by the board of directors ;[2] but we venture to affirm, notwithstanding some decisions to the contrary, that he may sell particular articles of personal property without express authority from the board, as, for example, a car or a locomotive. The president does not merely by virtue of his

[1] Griffith *v.* Chicago, etc., R. Co., 74 Iowa 85; Templin *v.* Chicago, etc., R. Co., 73 Iowa 548; Risley *v.* Indianapolis, etc., R. Co., 1 Hun 202; Central, etc., Co. *v.* Condon, 67 Fed. R. 84. See Fitzgerald *v.* Fitzgerald, etc., Co., 41 Neb. 374, s. c. 62 N. W. R. 899.

[2] Walworth County Bank *v.* Farmers', etc., Co., 14 Wis. 325; Bliss *v.* Kaweah, etc., Co., 65 Cal. 502; Fulton Bank *v.* New York, etc., Co., 4 Paige 127. As suggested in the preceding section, we are inclined to think that cases such as those cited in this note can not apply with full force to railroad companies.

office possess authority to dispose of all of the assets of the company for such an act is one beyond the scope of his authority.[1] Some of the cases assert that the president can not purchase property for the corporation,[2] but we think that he may within reasonable limits purchase property required for use in the ordinary course of the corporate business, but that the authority to purchase is a limited one. The president, under ordinary circumstances, has no implied power to release parties from liability to the corporation.[3] Authority to mortgage the corporate property can not be implied, but must be conferred by the board of directors or by that branch of the corporate government in which power to authorize the execution of mortgages is lodged.[4] Unless otherwise provided, in the act of incorporation or by-laws, the president of a railroad company has a general supervision and authority over the subject of employing and discharging corporate agents and servants.[5] There is a conflict of authority upon the question as to whether he has the power to commence an action on behalf of the company;[6] but, for our part, we can see no sufficient reason why he may not do so in ordinary cases. He may employ counsel to defend an action or suit against the company. He has no implied power to bind the company by

[1] Titus *v.* Cairo, etc., Co., 37 N. J. Law 98, 102. See McCullough *v.* Moss, 5 Denio 567.

[2] Bliss *v.* Kaweah, etc., Co., 65 Cal. 502.

[3] Risley *v.* Indianapolis, etc., Co., 1 Hun 202; Soper *v.* Buffalo, etc., Co., 19 Barb. 310; Miller *v.* Rutland, etc., Co., 36 Vt. 452.

[4] Luse *v.* Isthmus, etc., R. Co., 6 Ore. 125; England *v.* Dearborn, 141 Mass. 590. See, generally, Davis *v.* Rock Creek, etc., Co., 55 Cal. 359, s. c. 36 Am. R. 40; Alta, etc., Co. *v.* Alta Mining Co., 78 Cal. 629; Jesup *v.* City Bank, 14 Wis. 331.

[5] Arrapahoe, etc., Co. *v.* Stevens, 13 Col. 534.

[6] Recamier, etc., Co. *v.* Seymour, 5 N. Y. Supp. 648; Colman *v.* West Virginia, etc., Co., 25 W. Va. 148; Bright *v.* Metairie, etc., Assn., 33 La. Ann. 58; Reno, etc., Co. *v.* Leete, 17 Nev. 203; Davis *v.* Memphis, etc., R. Co., 22 Fed. R. 883; American, etc., Co. *v.* Oakley, 9 Paige 496, s. c. 38 Am. Dec. 561; Wetherbee *v.* Fitch, 117 Ill. 67; Oakley *v.* Workingmen's, etc., Soc., 2 Hilt. (N. Y.) 487; Potter *v.* New York, etc., Co., 44 Hun 367. Ashuelot, etc., Co. *v.* Marsh, 1 Cush. 507; Globe Works *v.* Wright, 106 Mass. 207; White *v.* Westport, etc., Co., 1 Pick. 215, s. c. 11 Am. Dec. 168; Bailey *v.* Snyder, 61 Ill. App. 472.

consenting to the appointment of a receiver,[1] nor has he power to make an assignment of the corporate assets for the benefit of creditors.[2]

§ 286. **President — Powers implied from grant of authority by the board of directors.**—It seems proper, in order to prevent a possible misunderstanding, that we should say, by way of explanation, that in discussing the incidental and implied powers of the president we have had reference only to the powers incident to the office bestowed upon him, and to those implied from the nature of the office itself. The board of directors may materially extend the powers of the president and invest him with authority much beyond that inherent in the office of president.[3] Where the directors rightfully invest the president with a principal power he takes it with all the incidental powers essential to a proper exercise of the principal power conferred upon him.[4]

[1] Walters *v.* Anglo-Saxon, etc., Co., 50 Fed. R. 316.

[2] Asher *v.* Sutton, 31 Kan. 286; Gibson *v.* Goldthwaite, 7 Ala. 281, s. c. 42 Am. Dec. 592; Hallowell, etc., Bank *v.* Hamlin, 14 Mass. 178; Luse *v.* Isthmus, etc., R. Co., 6 Ore.125,s.c. 25 Am. R. 506. He may be authorized by the governing board to make an assignment. Vanderpoel *v.* Gorman, 140 N. Y. 563, s. c. 24 L. R. A. 548. For cases declaring and enforcing the general doctrine as to the implied powers of a president of a corporation,' see, Smith *v.* Smith, 62 Ill. 493; Bank of Healdsburg *v.* Bailhache, 65 Cal. 327; Rhodes *v.* Webb, 24 Minn. 292; Northern Central, etc., R. Co. *v.* Bastian, 15 Md. 494; Indianapolis, etc., Co. *v.* St. Louis, etc., R. Co., 26 Fed. R. 140; Duncomb *v.* New York, etc., Co., 88 N. Y. 1, s. c. 13 Am. & Eng. R. Cas. 84; Stow *v.* Wyse, 7 Conn. 214, s. c. 18 Am. Dec. 99; Chicago, etc., R. Co. *v.* James, 24 Wis. 388; Greig *v.* Riordan, 99 Cal. 316, s. c. 33 Pac. R. 913; Nichols *v.* Scranton, etc., Co., 137 N. Y. 471, s. c. 33 N. E. R. 561; Oakes *v.* Cattaraugus, etc., Co., 143 N. Y. 430, s. c. 38 N. E. R. 461; Crowly *v.* Genesee, etc., Co. 55 Cal. 273; Jourdan *v.* Long Island R. Co., 115 N. Y. 380, s. c. 22 N. E. R. 153; Sherman, etc., Co. *v.* Swigart, 43 Kan. 292, s. c. 2 Lewis Am. R. R. & Corp. Rep. 158.

[3] Smith *v.* Smith, 62 Ill. 493, 496; Seeley *v.* San Jose, etc., Co., 59 Cal. 22; Lee *v.* Pittsburgh, etc., Co., 56 How. Pr. 373; Castle *v.* Belfast, etc., Co., 72 Me. 167; Mitchell *v.* Deeds, 49 Ill. 416, s. c. 95 Am. Dec. 621; Lucky, etc., Co. *v.* Abraham, 26 Ore. 282, s. c. 38 Pac. R. 65; Hawly *v.* Gray Bros., etc., Co., 103 Cal. 337, 39 Pac. R. 609; State *v.* Heckart, 62 Mo. App. 427.

[4] Baker *v.* Cotter, 45 Me. 236; Howland *v.* Myer, 3 N. Y. 290; Hatch *v.* Coddington, 95 U. S. 48; Irwin *v.* Bailey, 8 Biss. 523. But the implied power is only such as is necessary to effectuate the principal power. Sec-

§ 287. **President—Influence of usage.**—The usage of a railway company is an important factor in determining the power of its president. The president may often be invested with authority by corporate usage. It is not possible to lay down any definite rules upon this subject, but it may be safely said that long continued usage may confer authority upon the president much greater than that inherent in his office and essentially greater than that expressly conferred upon him by the board of directors or the stockholders of the corporation.[1]

§ 288. **President—Apparent authority.**—The authority with which the corporation ostensibly invests its president is as to persons dealing in good faith and without notice of his actual authority, the authority which he possesses; but it is not his authority in cases where the person dealing with him has notice of his acutal authority.[2] The question in such cases is as to the ostensible authority with which the president has been invested, not as to the authority actually conferred upon him. In most cases the question as to whether the president has been clothed with authority to perform the act upon which the claims of corporate liability is based is one of fact. Where the person dealing with the president has notice that the president is acting for himself, or knows that the business he is engaged in is not corporate business, the corporation is not bound.[3]

ond, etc., R. Co. *v.* Mehrbach, 17 Jones & S. 267.

[1] Minor *v.* Mechanics' Bank, 1 Pet. 46; Mount Sterling, etc., R. Co. *v.* Looney, 1 Metcf. (Ky.) 550; Northern Cent. R. Co. *v.* Bastian, 15 Md. 494; Walker *v.* Detroit, etc., Co., 47 Mich. 338; Merchants', etc., Bank *v.* Citizens', etc., Co., 159 Mass. 505, s. c. 34 N. E. R. 1083. See, generally, Moyer *v.* East Shore, etc., Co., 41 S. C. 300, s. c., 25 L. R. A. 48, 19 S. E. R. 651; Bell *v.* Hanover, etc., Bank, 57 Fed. R. 821; Mining Co. *v.* Anglo Californian Bank, 104 U. S. 194; Martin *v.* Webb, 110 U. S. 7, s. c. 3 Sup. Ct. R. 428; Western, etc., Co. *v.* Bayne, 11 Hun 166.

[2] The rule upon this subject is substantially the same whether the agent of the corporation be the president or some other agent. Manhattan, etc., Co. *v.* Forty-second, etc., R. Co., 139 N. Y. 146, s. c. 34 N. E. R. 776; Bank of Batavia *v.* New York, etc., R. Co., 106 N. Y. 195; Fifth Av. Bank *v.* Forty-second, etc., R. Co., 137 N. Y. 231.

[3] Stone *v.* Hayes, 3 Denio 575; Bentley *v.* Columbia, etc., Co., 17 N. Y. 421; Claflin *v.* Farmers', etc., Bank, 25 N. Y. 293; Wilson *v.* Metropolitan,

§ 289. **President — Ratification of unauthorized acts.** — The acts of the president, like those of any other agent, although beyond the scope of his authority, may, of course, be ratified by the corporation.[1] There is, it is barely necessary to suggest, no doubt as to the general rule that unauthorized acts may be ratified, but it is not always easy to say what will be deemed a ratification.[2] Acts clearly and entirely beyond the corporate power can not be ratified.

§ 290. **President—Dealings with corporation.**—Essentially the same rules apply to transactions by the president with the corporation as those which govern transactions between the corporation and the directors. The president acts in a fiduciary capacity, and is bound to exercise the utmost good faith in dealing with the corporation. He may deal with it, but his course must be open, honest and fair or else the courts will set the transaction aside or hold him responsible in damages at the suit of one having a right to invoke judicial assistance.[3]

§ 291. **President—Relation to shareholders.**—In our judgment the president is a trustee for the shareholders, although he may not be a trustee in the full sense of the term.[4] He un-

etc., R. Co., 120 N. Y. 145; Moores *v.* Citizens' Nat. Bank, 111 U. S. 156; Farrington *v.* South Boston R. Co., 150 Mass. 406; Manhattan, etc., Co. *v.* Forty-second, etc., R. Co., 139 N. Y. 146, 151, s. c. 34 N. E. R. 776.

[1] Olcott *v.* Tioga R. Co., 27 N. Y. 546; Pixley *v.* Western Pac. R. Co., 33 Cal. 183; Pittsburgh, etc., R. Co. *v.* Woolley, 12 Bush. (Ky.) 451; Southgate *v.* Atlantic, etc., R. Co., 61 Mo. 89. When the president of a corporation executes, in its behalf and within the scope of its charter, a contract which requires the concurrence of the board of directors, and the board, having full knowledge of his act, does not dissent within a reasonable time, it will be presumed to have ratified the contract. Pittsburgh, C. & St. L. Co. *v.* Keokuk & H. B. Co., 131 U. S. 371.

[2] Jourdan *v.* Long Island, etc., R. Co., 115 N. Y. 380, s. c. 22 N. E. R. 153; Gutta Percha, etc., Co. *v.* Village of Ogalla, 40 Neb. 775, s. c. 59 N. W. R. 513; Alabama, etc., Co. *v.* South, etc., R. Co., 84 Ala. 570, s. c. 5 Am. St. R. 401; Dorenbecker *v.* Columbia C. L. Co., 21 Oreg. 573; Currie *v.* Bowman, 25 Ore. 364, 35 Pac. R. 848; Taylor *v.* Albermarle, etc., Co., 105 N. C. 484, s. c. 10 S. E. R. 897; Chateau *v.* Allen, 70 Mo. 290.

[3] *Ante*, § 276; Baker *v.* Harpster, 42 Kans. 511; Bensiek *v.* Thomas, 66 Fed. R. 104; Krohn *v.* Williamson, 62 Fed. R. 869; Bristol *v.* Scranton, 63 Fed. R. 218; Bristol *v.* Scranton, 57 Fed. R. 70, and cases cited.

[4] Board *v.* Reynolds, 44 Ind. 509.

questionably occupies fiduciary relations to the stockholders of the corporation. While the cases generally concede that a fiduciary relation exists between him and the shareholders, yet they discriminate between the relationship and that of one who is in the strict sense a trustee.[1] It has been held that as the powers of the president are so limited the same person may fill the office of president of two distinct corporations, and such identity does not of itself invalidate dealings between the two corporations,[2] but we suppose that this doctrine is to be taken with some qualification, for no officer can rightfully accept a position that requires of him acts adverse to the corporation he represents.

§ 292. **Treasurer—Generally.**—The treasurer of a railway company is, as a rule, the officer who has custody of its funds, upon whom warrants are drawn, and by whom corporate funds are disbursed. The authority of the treasurer is generally prescribed by the charter or defined by the corporate by-laws. He necessarily possesses some incidental authority, but it is narrow in its scope. He has no general implied power to purchase property for the company, nor has he implied power to sell corporate property, neither has he implied power to borrow money on the credit of the corporation.[3] The corporation may enlarge the authority of the treasurer and usage may so extend the scope of his authority as to carry it beyond that which is inherent in the office itself. By continued usage the powers

[1] Allen *v.* Curtis, 26 Conn. 456; Smith *v.* Hurd, 12 Metcf. (Mass.) 371; Carpenter *v.* Danforth, 52 Barb. 581. See, generally, Johnson *v.* Laflin, 5 Dill. 65; Deaderick *v.* Wilson, 8 Baxt. 108; Gilbert's Case, L. R. 5 Ch. App. 559; Heman *v.* Britton, 14 Mo. App. 121; Crowell *v.* Jackson, 53 N. J. L. 656, s. c. 23 Atl. R. 426; Perry *v.* Pearson, 135 Ill. 218, s. c. 25 N. E. R. 636; Scott *v.* De Pyster, 1 Edw. Ch. 513. Several of the cases cited hold that the president may buy stock of the shareholder, and if he does not actually mislead the person with whom he deals the sale will be valid. If, however, there is a positive misrepresentation the transaction will be voidable. Fish *v.* Budlong, 10 R. I. 525; Prewett *v.* Trimble, 92 Ky. 176, s. c. 17 S. W. R. 356.

[2] Leathers *v.* Janney, 41 La. Ann. 1120, s. c. 6 L. R. A. 661, 6 So. R. 884.

[3] Craft *v.* South Boston, etc., Co., 22 N. E. R. 920, 150 Mass. 207, s. c. 5 L. R. A. 641, Chemical National Bank *v.* Wagner, 93 Ky. 525, s. c. 20 S. W. R. 535.

of the treasurer may be enlarged, and he may bind the corporation by acts performed within the scope of the agency created or sanctioned by usage.[1] It has been held that drafts accepted by the treasurer are presumed to be properly accepted.[2] The treasurer unless specially authorized or unless authorized by usage can not bind a railway corporation by the acceptance of accommodation drafts. As we have said, the treasurer has no general authority to borrow money for the company, and it is held that even though he borrows money, which is used for the purposes of the corporation, the lender can not recover it from the corporation, where it appears that it was used instead of other money which the treasurer had embezzled, and that the primary object in borrowing it was to conceal his default.[3] There is, it is obvious, an essential difference between the authority of the treasurer of a trading corporation in the habit of borrowing money for corporate use and the treasurer of a railroad company, and the authority of the treasurer of a trading corporation in this respect is broader and less limited than that of a railroad company.[4] The treasurer of a corporation has no power as such to confess judgment for it,[5] nor as a rule can he conduct litigation for the corporation. It is held, however, that he has authority to compromise a disputed claim which he is authorized to collect.[6] While the general rule is that the treasurer, by virtue of his office, has no authority to conduct litigation for the corporation, yet such authority may be implied in particular instances; thus, if a promissory note is placed in his hands for collection he may cause suit to be brought upon it.[7] Unless the authority to execute accommoda-

[1] Lester *v.* Webb, 1 Allen 34; Page *v.* Fall River, etc., R. Co., 31 Fed. R. 257; Merchants' Bank *v.* State Bank, 10 Wall. 604.

[2] Credit Co. *v.* Howe, etc., Co., 54 Conn. 357, s. c. 1 Am. St. R. 123. But we suppose that this presumption is at most a rebuttable one.

[3] Craft *v.* South Boston R. Co., 150 Mass. 207, s. c. 5 L. R. A. 641, 22 N. E. R. 920.

[4] Craft *v.* South Boston R. Co., 150 Mass. 207, s c. 5 L. R. A. 641, 22 N. E. R. 920. See Merchants', etc., Bank *v.* Citizens', etc., Co., 159 Mass. 505, s. c. 34 N. E. R. 1083.

[5] Stevens *v.* Carp River Iron Co., 57 Mich. 427, s. c. 24 N. W. R. 160.

[6] Gafford *v.* American, etc., Co., 77 Iowa 736, 42 N. W. R. 550.

[7] North Brookfield, etc., Bank *v.* Flanders, 161 Mass. 335, s. c. 37 N. E. R. 307.

tion paper is specially conferred upon the treasurer or is vested in him by usage he can not bind the corporation by the execution of such paper.[1] General authority to act for the corporation may, if not forbidden by the charter, be conferred on the treasurer, and where such authority is conferred his acts within its scope will bind the corporation.[2]

§ 293. **Treasurer—Duties—Liabilities.**—The treasurer, it is obvious, occupies a fiduciary relation toward the corporation and is prohibited from making use of his position to further his own interests. He can not rightfully do any act adverse to the interests of the company. The rule stated is applied with much strictness by some of the courts. Thus, it is held that he has no authority to pay himself a claim he holds against it, unless the claim has been approved and its payment authorized by the corporation.[3] The authorities recognize his right to deal with the corporation, but they require that in all his dealings with the corporation he shall exercise the utmost good faith.

§ 294. **Treasurer — Care of corporate funds.** — The treasurer is bound to exercise ordinary care, prudence and diligence in protecting and preserving the corporate funds placed in his charge. He is not absolutely responsible for the loss of corporate funds, but will be exonerated if it appears that he exercised reasonable care, prudence and diligence,[4] and if, without his fault or negligence they are lost, stolen or destroyed, he can not be held accountable;[5] but the loss falls upon his principal. This general rule applies to cases where the money is deposited for the company in a bank which the treasurer has

[1] Usher *v.* Raymond Skate Co., 163 Mass. 1, s. c. 39 N. E. R. 416.

[2] Parmelee *v.* Associated, etc., 11 Misc. 363, 32 N. Y. S. 149. In Hotchkiss, etc., Co. *v.* Union, etc., Bank, 68 Fed. R. 76, it is held that notice to the treasurer, given while engaged in transacting business for the corporation, is notice to the principal.

[3] Wayne Pike Co. *v.* Hammons, 129 Ind. 368; Aberdeen R. Co. *v.* Blakie, 1 Macq. 461; Peterborough R. Co. *v.* Wood, 61 N. H. 418.

[4] New York, etc., R. Co. *v.* Dixon, 114 N. Y. 80; Mowbray *v.* Antrim, 123 Ind. 24.

[5] Mowbray *v.* Antrim, 123 Ind. 24, 28; Wayne Pike Co. *v.* Hammons, 129 Ind. 368, 379.

reason to believe is sound, but which subsequently fails. It has been held that where a railroad company was notified by its treasurer of his expected absence, with a request that remittances be made to the firm of which he was a member, and remittances were made accordingly to the firm, and reports to stockholders made that funds were in the hands of such firm as "financial agents," the act of the treasurer in selecting the place of deposit was ratified and he was absolved from liability in that regard;[1] but we suppose that in such a case it devolves upon the treasurer to show that he acted with reasonable prudence and in good faith.

§ 295. **Secretary.**—The secretary of a railroad company has by virtue of his office very limited powers indeed, so far as concerns the conduct of the active business of the corporation. In the matter of making contracts he has, perhaps, some implied or incidental authority, but it is very narrowly circumscribed. He certainly has no general authority to make contracts for the company,[2] but contracts made by him may be so ratified as to bind the company.[3] He has no authority to bind the corporation by executing evidences of indebtedness;[4] nor, indeed, by any ordinary business contracts. He may, of course, be invested by the board of directors with power to contract,[5] but in such a case the source of his power is the action of the board and not the office of secretary. Where the secretary has power to bind the company and he acts within the scope of his power, the same general rules as to the effect of admissions and declarations apply that prevail in other cases of agency.[6]

[1] New York, etc., R. Co. *v.* Dixon, 114 N. Y. 80, s. c. 21 N. E. R. 110.

[2] Blanding *v.* Davenport, etc., Co., 88 Iowa 225, s. c. 55 N. W. R. 81.

[3] Nebraska, etc., Co. *v.* Bell, 58 Fed. R. 326.

[4] Holden *v.* Phelps, 141 Mass. 456. It was held in Moshannon, etc., Co. *v.* Sloan, 109 Pa. St. 532, s. c. 7 Atl. R. 102, that the secretary has no authority to release a debtor.

[5] Jefferson *v.* Hewitt, 103 Cal. 624, s. c. 37 Pac. R. 638. See, generally, Merchants', etc., Bank *v.* Hervey, etc., Co., 45 La. Ann. 1214, s. c. 14 So. R. 139; Nebraska, etc., Co. *v.* Bell, 58 Fed. 326, s. c. 7 C. C. A. 253; Moore *v.* H. Gaus, etc., Co., 113 Mo. 98, s. c. 20 S. W. R. 975; Famous Shoe, etc., Co. *v.* Eagle, etc., Works, 51 Mo. App. 66.

[6] Kraniger *v.* Peoples', etc., Assn., 60 Minn. 94, s. c. 61 N. W. R. 904.

§ 296. **Managing agents.**—There is a class of agents called "general managers," "superintendents," or the like, whose powers and authority are very broad and comprehensive. They are not in strictness corporate officers except where made so by the charter or by-laws; but their powers are really more extensive in many respects than those of some of the chief officers of the corporation. A general manager or superintendent can not, of course, exercise the powers or functions devolved upon the directors or other officers of the corporation,[1] but in conducting the actual business of the corporation he exercises very broad and comprehensive authority. The name or designation bestowed upon a managing agent does not necessarily determine the scope of his authority, but, within limits, indicates in a general way the nature of his authority. As we have elsewhere said the scope of his authority is ordinarily a question of fact to be determined from the evidence in the particular case.[2] We think, however, that where a railroad company holds out an agent as general manager or superintendent, the courts may take judicial notice of the general scope of his authority, but that the precise nature of his authority must, as a general rule, be determined from the facts and circumstances of the case in which the question arises.

§ 297. **Superintendent.**—The actual authority of a superintendent or general manager of a railroad or one of its divisions depends in a great degree upon the provisions of the charter and by-laws and the resolutions passed by the board of directors relative to such employment. As between the company and persons having knowledge of the terms of his employment, he will, as a general rule, be held to have only

[1] In the case of Evansville, etc., Co. *v.* Barnes, 137 Ind. 306, the court held that a superintendent of construction had no authority to open the road for the carriage of passengers, saying, "The board of directors and the established rules of the company alone could make the appellant a common carrier for hire and the appellee a passenger."

[2] *Ante*, § 211. Gamacho *v.* Hamilton Co., 37 N. Y. S. 725.

such powers as have been thereby expressly or impliedly conferred upon him.[1] But as to persons having no notice of his actual authority the rule is otherwise, for as to such persons he will be deemed to have the authority evidenced by the *indicia* of authority with which the corporation has invested him.[2] Where the duties of the office have not been defined, but the superintendent is simply given general authority to manage the business of the corporation, he will ordinarily be held to have such powers as appertain to the office by usage of the company by which he is employed,[3] and other companies of a similar character.[4] But it is essential in order to make the corporation liable for the acts of a general superintendent or general manager that the acts be performed in transacting the business of the corporation.[5] The superintendent of a railroad company, clothed with general power and authority in regard to the management of trains, is held to be the immediate representative and executive officer of the corporation, and his negligent and improper order, which causes an injury, renders the company liable as much as if it had emanated directly from the directors themselves in their official capacity.[6] In his dealings with third persons a superintendent, like any other agent, will be held to have power to bind the corporation within the limits of his apparent authority. And it is held that a general manager should be presumed

[1] A director of a corporation, contracting with another director of the corporation concerning the corporate property, who is also business manager with enumerated and limited powers, is chargeable with notice of any defect in the manager's authority to make said contract. Schetter *v.* Southern Oregon Co., 19 Ore. 192, s. c. 24 Pac. 25. See, generally, Walrath *v.* Champion, etc., Co., 63 Fed. R. 552.

[2] We have considered in another connection the authority of managing agents, such as superintendents and the like. *Ante*, § 222. See, generally, Railway, etc., Co. *v.* Lincoln, etc., Bank, 31 N. Y. Supp. 44; Merrill *v.* Hurley, (S. Dak.) 62 N. W. R. 958. 958.

[3] Olcott *v.* Tioga, etc., R. Co., 27 N. Y. 546. See, generally, Ecker *v.* Chicago, etc., Co., 8 Mo. App. 223, s. c. 1 Am. & Eng. R. Cas. 357; Madison, etc., Co. *v.* Norwich, etc., Society 24 Ind. 457; Mayall *v.* Boston, etc., Co., 19 N. H. 122.

[4] Louisville, etc., R. Co. *v.* McVay, 98 Ind. 391, 398.

[5] Cosh Murray Co. *v.* Adair, 9 Wash. 686, s. c. 38 Pac. R. 749.

[6] Washburn *v.* Nashville, etc., R. Co., 3 Head (Tenn.) 638.

to have the general control and direction of all matters connected with the operation of the railroad which the term indicates until the contrary is shown.[1] Accordingly, a railroad company is, it has been held, liable for the services of an attorney retained by its general manager to attend to its legal business, unless the attorney knew or might have known by using ordinary diligence that the manager had no authority to employ him.[2] It was held in another case that a railroad superintendent may bind the company by issuing a circular offering a general, standing reward for the arrest of train wreckers, although no special authority to do so has been granted him by the directors.[3] A railroad company has power, for the protection of its property,[4] to offer a general, standing reward for the arrest of train wreckers, and it may well be held that a superintendent invested with the general authority pertaining to that position may bind the company by offering a reward for the detection of persons who injure or destroy the property of the company.[5] In one case the court presumed that the general superintendent had authority to contract for fencing the company's road ;[6] in another, that he acted by the company's authority in denying an owner the right to remove his property from the company's premises;[7] in another it was held that he has authority to withdraw a notice to terminate a lease of the company's property ;[8] and in another case it was held that he may bind the company by his declarations relative to the purchase of fuel for the use of its

[1] Sacalaris *v.* Eureka, etc., R. Co., 18 Nev. 155; Louisville, etc., R. Co. *v.* McVay, 98 Ind. 391, 399. A promissory note, indorsed by a manager, must have been previously authorized or subsequently ratified as evinced by general course of business or resolution in order to render a business corporation liable upon it. Huntington *v.* Attrill, 118 N. Y. 365.

[2] St. Louis, Ft. S. & W. R. Co. *v.* Grove, 39 Kan. 731, 18 Pac. R. 958.

[3] Central R. & Bkg. Co. *v.* Cheatham, 85 Ala. 292, 7 Am. St. R. 48, 4 So. R. 828.

[4] Ricord *v.* Central Pacific R. Co., 15 Nev. 167; American Express Co. *v.* Patterson, 73 Ind. 430.

[5] Toledo, etc., Co. *v.* Rodrigues, 47 Ill. 188, s. c. 95 Am. Dec. 484.

[6] New Albany, etc., R. Co. *v.* Haskell, 11 Ind. 301.

[7] Giles *v.* Taff Vale R. Co., 2 E. & B. 822.

[8] Patrick *v.* Richmond, etc., R. Co., 93 N. C. 422.

locomotives.[1] We think the ruling in the case last cited is correct, because such a contract is one made in the course of the ordinary business of the company; but the authority to make such contracts may be specially conferred upon some other officer or agent, and in that event it could not be rightfully exercised by the superintendent. The decisions generally go upon the principle that the corporation can not deny the general authority of one whom it holds out as a general agent. But a superintendent's or manager's authority usually extends only to the management of the ordinary business of the corporation, and it is accordingly held that a sale of the property of a railroad corporation by the superintendent, unauthorized by the directors, passes no title.[2] Necessarily the question as to whether the superintendent is held out as possessing the authority asserted must be a question of fact in most instances, so that no general rule can be laid down as to the extent of his authority; but it may be safely said that he has no implied authority to make unusual or extraordinary contracts.

§ 298. **Superintendent — General conclusion.** — Decisions as to the authority of such officers, as managers and superintendents, depend so much upon the circumstances of the particular cases and there is such a wide range in the duties which the superintendents of different roads are required to perform, and in the powers which they are permitted to exercise, that no definite rule as to the precise extent of their authority can be safely stated. It is safe to say, however, that the authority of such an officer will be extended by implication to cover a very broad field where it is necessary to protect the interests of innocent parties dealing with him, but not in favor of persons having knowledge of the real extent of his powers and duties. The courts can not, of course, invest him with authority, but they can adjudge what, under the facts of the particular case, is the authority conferred upon him by the company. The nature of the business of conducting and

[1] Sacalaris *v.* Eureka, etc., R. Co., 18 Nev. 155.

[2] Bowen *v.* Mt. Washington R. Co., 62 N. H. 502.

managing a railroad is a matter of which the courts take judicial notice in a general way, and if they do take judicial notice of such a matter they must of necessity take notice that some general ministerial agent is required who can actively supervise and manage the ordinary details of the operation of the road.[1] We do not, however, mean to be understood as saying that courts will take judicial notice of the scope of the superintendent's authority in a particular case or where it is asserted to embrace a subject not clearly within the general scope of the authority of that class of agents.

§ 299. **Intermediate agents.**—In order to perform its duty to the public and properly conduct its corporate affairs it is necessary that a railroad company should have general implied power to appoint intermediate agents, and the courts recognize the existence of this power and hold railroad companies responsible for the acts of such agents when performed within the scope of their authority or within the line of their duty. It is only, however, to a very limited extent that the courts can judicially know the nature of the authority of such subordinate agents. In most cases the nature and extent of their authority is to be determined as a question of fact from the evidence in the particular case, but, as we believe, the courts may in some cases take judicial notice of the general and ordinary authority of subordinate agents. We have elsewhere referred to cases showing the nature of the authority of subordinate agents.[2]

§ 300. **Intermediate agents—Agent for one purpose not for another.**—It may happen that a person may be a corporate agent for one purpose and yet not for another. Thus, a fore-

[1] Courts take judicial notice of the hazardous nature of the business of operating railway trains, and of the authority of a superintendent in relation to such matters. Union Pacific R. Co. *v.* Winterbotham, 52 Kan. 433, s. c. 59 Am. & Eng. R. Cas. 75, citing Union Pac. Railway Co. *v.* Beatty, 35 Kan. 265, s. c. 26 Am. & Eng. R. Cas. 84; Pacific Railroad Co. *v.* Thomas, 19 Kan. 256; Railroad Co. *v.* Beecher, 24 Kan. 228; Cincinnati, etc., Railroad Co. *v.* Davis, 126 Ind. 99, s. c. 44 Am. & Eng. R. Cas. 459.

[2] *Ante*, §§ 220, 221, 222.

man may be an agent for the purpose of hiring and discharging section men, but as to work on the track be a mere servant.[1] It is obvious that the person assuming to act as an agent is only an agent when performing the duties of an agent, and in performing other duties is a servant or employe, although he may be acting in all he does under a contract of employment. The acts of a servant or employe are in many respects essentially different from those of an agent, and this difference, as we shall hereafter show, leads to important results.

§ 301. **Intermediate agents and servants distinguished.**— The adjudged cases distinguish between subordinate agents and servants, and the distinction often becomes one of importance. It is very difficult, indeed it is impossible, in the present state of the authorities, to accurately discriminate between agents and servants. It is, perhaps, safe to say that when a duty personal to the master is intrusted to an employe, the employe is as to that duty an agent, although as to other duties he may be a servant; if, however, the duty is not one personal to the employer the relationship between employer and employe is ordinarily not that of principal and agent, but is that of master and servant. The employer may, of course, by custom and usage, confer authority upon a servant beyond that appertaining to such relation, but ordinarily a servant has no authority to make contracts for the master.

§ 302. **Conductors.** — The authority of the conductor ordinarily extends to the control of the movements of his train, and to the immediate direction of the movements of the employes engaged in operating the train, and he is, to a great extent, the representative of the company in such dealings as it may be necessary for the passengers to have with it while *en route*.

[1] Justice *v.* Pennsylvania Co., 130 Ind. 321. We do not, at this place, enter upon a consideration of the vexed question of whether the authority to hire and discharge, constitutes the person clothed with that authority, an agent for all purposes connected with his line of service under his contract of employment, but elsewhere consider that question. See Muhlman *v.* Union Pacific Co., 2 L. A. R. 192, and notes; Mealman *v.* Union Pac. Ry. Co., 37 Fed. R. 189.

Consequently the company is liable to passengers, and, in some cases, to third persons if he fails to take proper precautions to guard against injury from any defects in cars, engines, or equipments, which are discoverable,[1] or permits employes to move the cars in such a manner as to cause an injury,[2] or is guilty of any improper or unfair conduct toward the passengers in his charge.[3] It is responsible for his acts done in the line of his employment, although they were done willfully[4] and in direct opposition to the instructions and orders of his employers.[5] His authority does not, ordinarily, extend to making contracts on behalf of the company, but there may be cases of urgent emergency where he may make a contract for the company. He is to administer the rules of the company rather than make contracts for it. It has been held that, acting under a general authority, he may, in his discretion, relax or apply these rules within reasonable bounds, according to circumstances;[6] but this doctrine, as it seems to us, is one to be cautiously applied and kept within strict limits, for there is certainly no general authority to alter or suspend the established rules and regulations of the company. The establishment or alteration of rules and regulations is not, ordinarily, within the authority of a conductor, since it is his duty to obey and carry into effect the rules and regulations of the company. As we have said, the conductor has no general authority to make contracts on behalf of the company, but he may in rare cases of necessity, when circumstances demand it, bind the company by such contracts as are clearly necessary to enable him to carry out his prescribed duties.[7] In order that contracts made by

[1] Mad River, etc., R. Co. *v.* Barber, 5 Ohio St. 541, 67 Am. Dec. 312. Ordinarily the conductor is, according to the weight of authority, a fellow-servant of other employes engaged in the management and operation of trains.

[2] Rauch *v.* Lloyd, 31 Pa. St. 358.

[3] As where he exacts illegal fare. Porter *v.* New York Central R. Co., 34 Barb. (N. Y.) 353. Or assaults a passenger. Ramsden *v.* Boston, etc., R. Co., 104 Mass. 117; Craker *v.* Chicago, etc., R. Co., 36 Wis. 657; Jeffersonville, etc., R. Co. *v.* Rogers, 38 Ind. 116.

[4] Jeffersonville R. Co. *v.* Rogers, 38 Ind 116; Craker *v.* Chicago, etc., R. Co., 36 Wis. 657.

[5] Porter *v.* New York Central R. Co., 34 Barb. (N. Y.) 353.

[6] O'Donnell *v.* Allegheny Valley R. Co., 59 Pa. St. 239.

[7] Terre Haute, etc., R. Co. *v.* McMurray, 98 Ind. 358; Goff *v.* Toledo, etc., Co., 28 Ill. App. 529.

him shall be obligatory upon the company they must be made to enable him to perform the duties required of him and must not relate to collateral matters nor be outside of the line of the duty assigned him. Thus, he may, where other provision has not been made, employ mechanics to repair a break of the cars or machinery which must be repaired before the train can proceed to its destination, and may engage men and teams to render the road-way or bridges secure for the passage of his train, when weakened or partially swept away by unforeseen causes; but in such cases the authority to contract does not exist unless there is an urgent necessity for immediate action. It is the necessity which confers authority, not simply the position of conductor.[1] Doubtless he may, in case of the sudden death or disability of the engineer, engage a competent engineer to take the train to a point where another engineer in the employ of the company can be obtained, if such employment be an urgent necessity and required to avoid disaster or serious injury to the company. It has been held that the conductor has authority, when the regular brakeman is sick or absent, and the proper and safe management of the train so requires, to supply the place of the sick or absent brakeman, and render the substitute so employed an employe of the company for the time being;[2] but we suppose this doctrine can only apply in very rare cases, for, as a general rule, a conductor has no authority to employ agents or servants for the com-

[1] Terre Haute, etc., R. Co. *v.* McMurray, 98 Ind. 358.

[2] Sloan *v.* Central Iowa R. Co., 62 Iowa 728; Georgia Pacific R. Co. *v.* Propst, 83 Ala. 518, 85 Ala. 203, 90 Ala. 1. On the second appeal of this case it was held that evidence that the plaintiff, a night watchman, was riding to his home on the train, when, one of the brakemen being sick, the conductor asked plaintiff to make a coupling for him, did not show such a necessity as conferred upon the conductor an authority to employ the brakeman, nor did it show any employment at all, either with or without authority. We suppose that the right to employ a brakeman exists only in cases of urgent necessity, for the authority to employ agents or servants is no part of a conductor's general authority. If there is no emergency there is no authority to employ servants, and it is only in very rare and exceedingly clear cases that such authority can exist. Church *v.* Chicago, etc., Co., 50 Minn. 218, s. c. 52 N. W. R. 647; Jewell *v.* Grand Trunk Railway, 55 N. H. 84.

pany. The authority of the conductor to enter into contracts for the company is created by the necessity for the exercise of such authority, and as soon as the emergency is past the authority terminates.[1] In one of the decided cases it seems to be held that a conductor may bind the company by a contract to carry a passenger to a particular place on the line of the road,[2] and if the case is to be understood as so deciding we think it must be regarded as unsound; if, however, it is to be regarded as deciding that the place was one at which the conductor was authorized to stop the train if he so elected, then we think that the decision correctly declares the law. In our judgment a conductor has no authority to stop trains at places not provided for by the rules or time schedules of the company, unless a discretion as to stopping is vested in him. The safety of the public, as well as the interests of the railroad company, requires that stops should be made only at places authorized by the company. The conductor has no general authority to designate the places where the trains shall stop, and he can not bind the company by a contract to stop at a certain place unless he is authorized to stop at that place by the rules, regulations or custom of the company. We have at this place merely outlined the authority and duties of a conductor as we have treated of his duties and powers with regard to passengers in the discussion of the subject of the duties and liabilities of a railroad company as a carrier of passengers.

§ 303. **Station agents.**—It is held that the courts can not take judicial notice of the powers of a station agent,[3] but we suppose they may in a very general way take notice of the authority of such an agent. They certainly do take notice that he has no authority to change the rules of the company as to the places where trains shall stop to discharge passengers.[4] Proof of his general authority to make contracts for the shipment of

[1] Louisville, etc., R. Co. *v.* Smith, 121 Ind. 353.

[2] Hull *v.* East Line, etc., R. Co., 66 Texas 619, s. c. 28 Am. & Eng. R. Cas. 221.

[3] Wood *v.* Chicago, etc., R. Co., 59 Iowa 196.

[4] White *v.* Evansville, etc., R. Co., 133 Ind. 480, s. c. 33 N. E. R. 273.

freight over the line of a railroad is sufficient evidence from which to infer his authority to contract with reference to all the necessary and ordinary details of the business.[1] His admissions and declarations, made within the scope of his authority, are, of course, binding upon the company, like those of any other agent; but it is held to be error in an action for a penalty for delay in shipping local freight to admit the declarations of a station agent whose agency is unconnected with the through freight business, to the effect that the company during a certain season used most of its cars in transporting through freight.[2] His general authority being established, he will be held to possess authority to bind the company by a contract to furnish cars by a certain day,[3] or to carry the freight to its destination and deliver it within any reasonable time agreed upon[4] or to deliver goods at an unusual place upon its own line.[5] Where he is given charge of the depot building and station grounds he may make reasonable rules for the regulation of persons having business to transact with the company,

[1] Blodgett *v.* Abbot, 72 Wis. 516, s. c. 7 Am. St. R. 873, 40 N. W. R. 491. Wood *v.* Chicago, etc., R. Co., 68 Iowa 491; See, generally, Mayall *v.* Boston, etc., Railroad, 19 N. H. 122; Illinois, etc., Co. *v.* Jonte, 13 Ill. App. 424; Brown *v.* Louisville, etc., Co., 36 Ill. App. 140; Merchants', etc., Co. *v.* Joesting, 89 Ill. 152; London, etc., R. Co. *v.* Bartlett, 7 H. & N. 400; Lewis *v.* Great Western, etc., Co., 5 H. & N. 867; Squire *v.* New York, etc., Co., 98 Mass. 239; Congar *v.* Galena, etc., R. Co., 17 Wis. 477. It is held in Marsh *v.* Chicago, etc., Co., 79 Iowa 332, s. c. 44 N. W. R. 562, that an agent having authority to make special rates may agree to give a rebate. It is held in the Province of Ontario, that a station agent is an "officer" within the meaning of a statute providing that "any of the officers" of a body corporate may be examined touching the matters in question in an action, at least where the action is based upon a contract executed by such station agent on behalf of the company. Ramsay *v.* Midland R. Co., (Ont.) 16 Am. & Eng. R. Cas. 594.

[2] Branch *v.* Wilmington, etc., R. Co., 88 N. Car. 573.

[3] Wood *v.* Chicago, etc., R. Co., 68 Iowa 491; Easton *v.* Dudley, 78 Tex. 236, 14 S. W. 583. Provided the shipper has no actual knowledge of a defect in the agent's authority which prevents him from making such a contract that shall bind the company. Harrison *v.* Missouri Pac. R. Co., 74 Mo. 364.

[4] Deming *v.* Grand Trunk R. Co., 48 N. H. 455.

[5] Southern Express Co. *v.* McVeigh, 20 Gratt (Va.) 264; Phillips *v.* North Carolina R. Co., 78 N. C. 294, Mann *v.* Birchard, 40 Vt. 326; Webber *v.* Great Western R. Co., 3 H. & C. 771.

and may exclude persons who refuse to conform to such regulations, and others who come to the station for purposes of their own not connected with the company's business.[1] And station agents will, in general, be held to have such additional powers as may be conferred upon them, either expressly or by implication from the usual course of business. A station agent may bind his principal within the limits of his apparent authority, even though that authority is restricted by secret instructions, which are unknown to the other contracting party.[2] The court will not, however, presume that the agent had authority to bind the company by contract for carriage beyond its own line,[3] since a common carrier is not required to deliver goods at a point beyond its line.[4] Where a station agent signed

[1] Commonwealth *v.* Power, 7 Met. (Mass.) 596.

[2] Wood *v.* Chicago, etc., R. Co., 68 Iowa 491; Pruitt *v.* Hannibal, etc., R. Co., 62 Mo. 527, where it is held that notice of restrictions upon the agent's authority must be conveyed to the public in such a manner as to authorize the inference that shippers are apprised of them. See, also, Harrison *v.* Kansas City, etc., R. Co., 50 Mo. App. 332; Lake Shore, etc., Co. *v.* Foster, 104 Ind. 293, s. c. 54 Am. R. 319, 4 N. E. R. 20; Brooke *v.* New York, etc., Co., 108 Pa. St. 529; Johnson *v.* Central Vt. R. Co., 56 Vt. 707, s. c. 19 Am. & Eng. R. Cas. 169; Southern Express Co. *v.* Womack, 1 Heisk. (Tenn.) 256. In Illinois Cent. R. Co. *v.* Bryant, 70 Miss. 665, s. c. 12 So. R. 592, it is held that where it has been the custom for a station agent to receive notice of the assignment of the wages of employes, notice to such agent is notice to the company. See Memphis, etc., Co. *v.* Koch, 28 Kan. 565, s. c. 9 Am. & Eng. R. Cas. 429. As to when notice to station agent is notice to the company, see Merrill *v.* American, etc., Co., 62 N. H. 514; Wells *v.* American, etc., Co., 44 Wis. 342; Great Western, etc., Co. *v.* Wheeler, 20 Mich. 419.

[3] Cummins *v.* Dayton, etc., R. Co., (Ind. Super. Ct., Marion Co.) 9 Am. & Eng. R. Cas. 36; Grover & Baker, etc., Co. *v.* Missouri Pacific R. Co., 70 Mo. 672.

[4] Burroughs *v.* Norwich, etc., Co., 100 Mass. 26; Wait *v.* Albany, etc., Co., 5 Lans. 475; Pittsburgh, etc., R. Co. *v.* Morton, 61 Ind. 539, 574; Cobb *v.* Iowa Central R. Co., 38 Iowa 601; Piedmont Mfg. Co. *v.* Columbia, etc., R. Co., 19 S. C. 353; People *v.* Chicago, etc., R. Co., 55 Ill. 95; Grover & Baker, etc., Co. *v.* Missouri Pac. R. Co., 70 Mo. 672; Erie R. Co. *v.* Wilcox, 84 Ill. 239; Oxlade *v.* North Eastern R. Co., 15 C. B. (N. S.) 680; Grover, etc., Co. *v.* Missouri Pac. R. Co., 70 Mo. 672. See, generally, as to authority of agents authorized to make contracts respecting transportation of passengers and goods, Houston, etc., R. Co. *v.* Hill, 63 Tex. 381; Missouri Pac. Co. *v.* Finley, 38 Kan. 550, 16 Pac. R. 951; Medbury *v.* New York, etc., Co., 26 Barb. 564; Michigan, etc., R. Co. *v.* Day, 20 Ill. 375; Riley *v.* New York, etc., R. Co., 34 Hun 97; Borden *v.* Richmond, etc., Co., 113 N. C.

receipts furnished in blank by a shipper, by the terms of which the corporation undertook to forward and deliver the goods to the order of the consignee at points on a connecting line, but it appeared that he acted without special authority and without the knowledge of the corporation in so doing, and that the agent had been furnished with blank forms of receipts by the company, by which it was provided that in case of loss or damage of the goods the corporation only should be responsible in whose actual custody the goods should be at the time, the company was held not liable for a loss occurring on a connecting line.[1] But the authority of a station agent to make contracts for the carriage of goods over connecting lines may be shown by evidence that such was the usual course of business,[2] since the company is bound by the acts of its agents which it has permitted for a length of time without objection. There is no doubt of the authority of a railroad company to enter into a valid contract of this character.[3] A local sta-

570, s. c. 18 S. E. R. 392; Angle *v.* Mississippi, etc., R. Co., 18 Iowa 555; Mulligan *v.* Northern, etc., R. Co., 4 Dak. 315, s. c. 29 N. W. R. 659.

[1] Burroughs *v.* Norwich, etc., R. Co., 100 Mass. 26.

[2] Grover & Baker, etc., Co. *v.* Missouri Pac. R. Co., 70 Mo. 672. Where a local agent of a railroad company was authorized to make a special contract for transporting a lot of corn from Illinois to Boston, but had no authority to contract for the return of a part of the freight charged, it was held that the company should not be allowed, after having availed itself of the benefits of the contract, to repudiate an agreement for the return of freight charges which he had introduced into the contract. Toledo, etc., R. Co. *v.* Elliott, 76 Ill. 67. Where it is shown that a station agent was in the habit of receiving goods for carriage over connecting lines, and was in possession of the company's stamp to be used upon receipts, which he issued for such goods, and that the company took possession of the goods and caused them to be shipped, with, at least, a presumptive knowledge of the terms of the receipt given, the agent will be presumed to have authority to contract for the shipment of goods over a connecting line. Hansen *v.* Flint, etc., R. Co., 73 Wis. 346.

[3] Ohio, etc., R. Co. *v.* McCarthy, 96 U. S. 258; Feital *v.* Middlesex R. Co., 109 Mass. 398; Milnor *v.* New York, etc., R. Co., 53 N. Y. 363; Morse *v.* Brainerd, 41 Vt. 550; Nashua Lock Co. *v.* Worcester, etc., R. Co., 48 N. H. 339; Perkins *v.* Portland, etc., R. Co., 47 Me. 573; Wheeler *v.* San Francisco, etc., R. Co., 31 Cal. 46; Candee *v.* Pennsylvania R. Co., 21 Wis. 582; Baltimore, etc., R. Co. *v.* Brown, 54 Pa. St. 77; Stewart *v.* Erie, etc., Trans. Co., 17 Minn. 372; Cincinnati R. Co. *v.* Pontius, 19 Ohio St. 221; Wilby *v.*

tion agent has no authority, generally, to contract to furnish cars to shippers at stations other than that at which he is stationed,[1] since his authority, real or apparent, extends only to the control of the company's business at his own station.[2] He has no such authority over the company's trains as will enable him to make a binding contract for the carriage of freight on a passenger train.[3] It is no part of his duties to assign seats to passengers upon a train, hence the company is not bound by directions given by a station agent to a passenger to ride in a dangerous place outside the car.[4] He can not make a binding contract with the company on his own behalf without giving the company an opportunity to ratify or disaffirm it after being put in possession of the fact of his interest.[5] So, he can not bind the company by a contract for the services of an assistant to perform a part of the duties of his office without express authority, since such a contract, by lessening the duties devolving upon him, would indirectly benefit the agent himself.[6] Upon the same principle, the railroad company can not be held liable for the failure of its station agent to perform duties which he undertakes in pursuance of his employment by a third person as an agent for the purchase and shipment of goods. The law does not favor double agencies.[7] If he ships his own goods at a higher rate than is allowed by law, he can not maintain an action to recover the overcharges paid, since he himself acted as the in-

West Cornwall R. Co., 2 Hurl. & N. 703. But see Converse *v.* Norwich, etc., Trans. Co., 33 Conn. 166.

[1] Missouri Pac. R. Co. *v.* Stultz, 31 Kan. 752.

[2] Voorhees *v.* Chicago, etc., R. Co., 71 Iowa 735.

[3] Elkins *v.* Boston, etc., R. Co., 3 Fost. (N. H.) 275.

[4] Little Rock, etc., R. Co. *v.* Miles, 40 Ark. 298.

[5] Pegram *v.* Charlotte, etc., R Co., 84 N. Car. 696, where the station agent negotiated for an excursion train to be run for his benefit to a Fourth of July celebration, and the court held that, his interests in the matter being adverse to those of the company, he was bound, by reason of his fiduciary relation toward the company, to disclose all material facts which would influence it in making the contract, including the fact that it was made for his own benefit, and his failure to do so would prevent him from enforcing the contract.

[6] Willis *v.* Toledo, etc., R. Co., 72 Mich. 160.

[7] Sumner *v.* Charlotte, etc., R. Co., 78 N. C. 289.

strument by which the wrong was done and was, therefore, a party to the wrong of which he complains.[1] Where the station agent performs an act that is beyond the power of the railroad corporation itself, the corporation is not necessarily bound thereby. It has even been held (erroneously, as we think) where a station agent caused the arrest of a shipper for refusing to pay the return charges for a horse that the company was not liable to an action for false imprisonment, since the company had no authority to arrest for non-payment of charges for carriage, and could not be held to have conferred such authority upon the agent.[2] While the railroad company is, ordinarily, liable to third persons for the fraudulent conduct of the station agent within the line of his employment, it is not so liable to persons having knowledge of the fraud. Accordingly, if a station agent issues a bill of lading for goods not placed in his possession and delivers it to a person acting in collusion with him, the railroad is not bound. It is held by many of the courts that as a bill of lading is not a negotiable instrument a fraudulent bill is void even in the hands of an innocent third person who has been induced to advance money upon the faith of it.[3] But a num-

[1] Steever *v.* Illinois Central R. Co., 62 Iowa 371, construing Chapter 68, Acts 1874.

[2] Poulton *v.* London, etc., R. Co., L. R. 2 Q. B. 534. But see Gulf R. Co. *v.* James, 73 Tex. 12, 10 S. W. 744, where the general manager made an arrest not authorized by the charter, and the company was held liable. And if the agent had authority to make arrests under any circumstances, the company may be held liable where he used his power without justification. Goff *v.* Great Northern R. Co., 30 L. Jour. Q. B. 148.

[3] Friedlander *v.* Texas, etc., R. Co., 130 U. S. 416, in which Fuller, C. J., speaking for the court, says: "The law can punish roguery, but can not always protect the purchaser from loss, and so fraud perpetrated through the device of a false bill of lading may work injury to an innocent party, which can not be redressed by a change of victims." Baltimore, etc., R. Co. *v.* Wilkens, 44 Md. 11; Stone *v.* Wabash, etc., R. Co., 9 Brad. (Ill.) 48. See Grant *v.* Norway, 2 Eng. L. & Eq. Rep. 337; Fellows *v.* Steamer R. W. Powell, 16 La. Ann. 316; Dean *v.* King, 22 Ohio St. 118; Louisiana Nat. Bank *v.* Laveille, 52 Mo. 380; Lake Shore, etc., Co. *v.* Foster, 104 Ind. 293, s. c. 54 Am. R. 319; National Bank *v.* Chicago, etc., R. Co., 44 Minn. 224; Sioux City, etc., R. Co. *v.* First National Bank, 10 Neb. 556. In Bank of N. Y., etc., *v.* American, etc., Co., 143 N. Y. 559, s. c. 38 N. E. R. 713, it is held that a by-law of a corporation authorizing an officer to

ber of courts hold the railroad company liable in such a case, upon the ground that it is the natural and necessary expectation of a carrier issuing bills of lading that they will pass freely from one to another and advances be made upon their faith, that the carrier has no right to believe, and never does believe, that their effect is limited to the person to whom they are first and directly issued,[1] and that it is estopped to deny the facts set out in a bill of lading issued by its accredited agent to the injury of one who has been misled thereby.[2] There is reason

sign warehouse receipts does not confer upon him authority to sign a receipt for his own property.

[1] Bank of Batavia *v.* New York, etc., R. Co., 106 N. Y. 195; Armour *v.* Michigan Cent. R. Co., 65 N. Y. 111, s. c. 22 Am. R. 603; Wichita Savings Bank *v.* Atchison, etc., R. Co., 20 Kan. 519. In this latter case the court says: "The custom of grain dealers is to buy of the producer his wheat, corn, barley, etc., then deliver the same to the railroad company for shipment to market. The railroad company issues to the shipper its bill of lading. The shipper takes his bill of lading to a bank, draws a draft upon his commission merchant or consignee against the shipment, and attaches his bill of lading to the draft. Upon the faith of the bill of lading and without further inquiry the bank cashes the draft, and the money is thus obtained to pay for the grain purchased, or to purchase other shipments. In this way the dealer realizes at once the greater value of his consignments, and need not wait for the returns of the sale of his grain to obtain money to make other purchases. In this way the dealer with a small capital may buy and ship extensively; and while having a capital of a few hundred dollars only, may buy for cash and ship grain valued at many thousands. This mode of transacting business is greatly advantageous both to the shipper and the producer. It gives the shipper who is prudent and posted as to the markets almost unlimited opportunities for the purchase and shipment of grain, and furnishes a cash market for the producer at his own door. It enables the capitalist and banker to obtain fair rates of interest for the money he has to loan, and insures him, in the way of bills of lading, excellent security. It also furnishes additional business to railroad companies, as it faciliates and increases shipments to the markets. A mode of doing business so beneficial to so many classes ought to receive the favoring recognition of the courts to aid its continuance." See, also, Brooke *v.* New York, etc., Co., 108 Pa. St. 529; Dean *v.* Driggs, 137 N. Y. 274.

[2] Brooke *v.* New York, etc., R. Co., 108 Pa. St. 529; St. Louis, etc., R. Co. *v.* Larned, 103 Ill. 293; Coventry *v.* Great Eastern R.Co.,L. R. 11 Q. B. Div. 776. Sioux City, etc., R. Co. *v.* First Nat. Bank, 10 Neb. 556, where the leading cases holding the contrary are very fully reviewed. In this case, Maxwell, C. J., speaking for the court, says: "All the testimony shows that the bills of lading in controversy were issued by an authorized agent of the railroad company, and that he not only had authority to issue

for the doctrine declared in the cases last referred to, for the act of the station agent in such cases in issuing the bill of lading must cause loss either to his employer or to some third person, and as the employer "trusted most it must suffer most." The maxim that, "where one of two innocent persons must suffer loss by the fraud of a third person, he who put it in the power of the third to commit the fraud must bear the loss" seems applicable to such cases. Analogous cases—those where warehouse receipts were issued—give support to the decisions under immediate mention.[1]

such bills, but it was one of the duties imposed upon him. As against an innocent purchaser of the bills, it will not do to say that the agent had authority to issue bills of lading duly signed, only in cases where shipments were made, and no authority where shipments were not made. The company itself has invested its own agent with the authority to issue bills of lading, and when duly issued they are not the bills of the agent, but of the railroad company. *The representation, therefore, thus made in the bills that the company has received a certain quantity of grain for shipment, is a representation to any one who, in good faith relying thereon, sees fit to make advances on the same.* If these representations are false, who should bear the loss? The party who appointed, placed confidence in, and gave authority to make the bills, or the one that in good faith, relying thereon, purchased or advanced money on the same? * * * The case presents every element necessary to constitute an estoppel *in pais*, a representation made with full knowledge that it might be acted upon, and subsequent action in reliance thereon, by which the defendants in error would lose the amount advanced if the representation is not made good. This principle was entirely overlooked in Grant *v.* Norway, and the cases following it."

[1] Babcock *v.* People's Bank, 118 Ind. 212; Preston *v.* Witherspoon, 109 Ind. 457; Planter's etc., Co. *v.* Merchants' etc., Bank, 78 Ga. 574; Neil *v.* Hill, 1 Wool. (U. S. C. C.) 96; Whitlock *v.* Hay, 58 N. Y. 484; Stewart *v.* Phenix Ins. Co., 9 Lea, 104; Cowdrey *v.* Vanderburgh, 101 U. S. 572.

CHAPTER XIV.

DIVIDENDS.

§ 304. Rights of stockholders—Dividends.
305. When dividend belongs to stockholder—Assignment.
306. To whom dividend should be paid.
307. Rights of life tenant and remainderman—Apportionment of dividends.
308. Duties of life tenant—Transfers.
309. Dividend is not property of the corporation—Rights of creditors and stockholders.
310. Dividend is irrevocable—Actions concerning.
311. Demand—Necessity and effect of.
§ 312. Declaration of dividend discretionary with directors.
313. Power to borrow money or declare stock dividend.
314. Remedies for abuse of discretion.
315. Limitations upon authority to declare a dividend—Suits to reclaim.
316. Dividends should be paid out of the profits.
317. Enjoining payment of dividends.
318. Personal liability of directors.
319. Dividends payable in scrip.
320. Stock dividends.
321. Dividends payable without discrimination.

§ 304. **Rights of stockholders—Dividends.**—A stockholder has no legal right to the property or undistributed profits of the corporation;[1] he has merely a right to participate, to a certain extent, in the management of the company and to share in the distribution of whatever property may remain after payment of its debts upon dissolution,[2] together with the further right, which constitutes the principal inducement to become a shareholder, of sharing in the distribution, which is made at longer or shorter intervals of time in all prosperous companies, of the profits arising from the business which the

[1] Jones *v.* Terre Haute R. Co., 57 N. Y. 196; Burroughs *v.* N. C. R. R. Co., 67 N. C. 376; Lockhart *v.* Van Alstyne, 31 Mich. 76, 78; Goodwin *v.* Hardy, 57 Me. 143; Granger *v.* Bassett, 98 Mass. 462; Commercial Fire Ins. Co. *v.* Board, 99 Ala. 1, s. c. 42 Am. State R. 17.

[2] Burrall *v.* Bushwick R. Co., 75 N. Y. 211, 216.

corporation is organized to transact.[1] When a corporate profit has been ascertained, declared, ordered and set aside by the proper corporate authorities to be paid to the stockholders on demand or at a fixed time, it is termed a dividend.[2] A resolution ascertaining the amount of the corporate profits, and declaring them payable to the stockholders, is a declaration of a dividend, even though it leaves the time of payment to be fixed afterward by the directors.[3]

§ 305. When dividend belongs to stockholder—Assignment. —The dividend belongs to the holder of the shares at the time it is declared,[4] and so soon as it is due it becomes his absolute property.[5] If the dividend be made payable on a day subse-

[1] Forbes *v.* Memphis, etc., R. Co., 2 Woods. (U. S.) 323, 331; Plimpton *v.* Bigelow, 93 N. Y. 592, 599.

[2] Chaffee *v.* Rutland R. Co., 55 Vt. 110; Lockhart *v.* Van Alstyne, 31 Mich. 76; Webb *v.* Earle, L. R. 20 Eq. 556; Hyatt *v.* Allen, 56 N. Y. 553. "A dividend is that portion of the profits and surplus funds of the corporation which has been actually set apart by a valid resolution of the board of directors, or by the shareholders at a corporate meeting, for distribution among the shareholders according to their respective interests, in such a sense as to become segregated from the property of the corporation, and to become the property of the shareholders distributively." 2 Thomp. Corp., § 2126, citing King *v.* Paterson, etc., R. R. Co., 29 N. J. L. 82.

[3] March *v.* Eastern R. R. Co., 43 N. H. 515; King *v.* Paterson, etc., R. Co., 29 N. J. Law, 82 and 504; Simpson *v.* Moore, 30 Barb. (N. Y.) 637; Foote, Appellant, 22 Pick. (Mass.) 299; Earp's Appeal, 28 Pa. St. 368; De Gendre *v.* Kent, L. R. 4 Eq. Cas. 283. But where the time of payment is not fixed, it has been held that a bill in equity is the appropriate and only remedy. Scott *v.* Eagle, etc., Co., 7 Paige (N. Y.) 198; Pratt *v.* Pratt, Read & Co., 33 Conn. 446.

[4] Wright *v.* Tuckett, 1 Johns. & H. (Eng. Ch.) 266; Bright *v.* Lord, 51 Ind. 272; Hopper *v.* Sage, 112 N. Y. 530; Boardman *v.* Lake Shore, etc., R. Co., 84 N. Y. 157, 178. All dividends declared previous to the death of the stockholder, and remaining unpaid, go to his administrator, even though not yet payable. *In re* Kernochan, 104 N. Y. 618; DeGendre *v.* Kent, L. R. 4 Eq. 283.

[5] Jermain *v.* Lake Shore, etc., R. Co., 91 N. Y. 483; King *v.* Paterson, etc., R. Co., 29 N. J. L. 82 and 504; Keppel's Adm'r *v.* Petersburg R. Co., Chase's Dec. (U. S.) 167; Scott *v.* Central R. Co. of Ga., 52 Barb. (N. Y.) 45; 1 Beach Priv. Corp., § 599. Where, however, the fact that a dividend has been voted by directors is not made public, or communicated to the stockholders, and no fund is set apart for payment, the vote may be rescinded. Ford *v.* East Hampton Rubber-Thread Co., 158 Mass. 84, s. c. 32 N. E. R. 1036. A potential right to a dividend is not a debt until the dividend is declared. Lockhart *v.* Van Alstyne, 31 Mich. 76, s. c. 18 Am. R. 156; *Re* Lon-

quent to that on which it is declared, the stockholder may, between the time it is declared and the time it becomes payable, assign and transfer either the stock[1] or the dividend[2] without affecting his title to the other, although a devise of the dividends without qualification has been held to carry with it the stocks themselves.[3] The fact that a dividend was earned before a transferee purchased his stock will not affect his title to dividends declared after such purchase.[4] He is entitled to all dividends declared while he owns it.[5]

§ 306. To whom dividend should be paid. — The general rule is that in cases of periodical payments due at intervals, and not falling due from day to day, there can be no apportionment.[6] Owning an option to purchase stock does not entitle the vendee to dividends declared before he has closed the bargain and while he still has the right to either purchase or refuse the stock,[7] although an absolute purchase of stock to be delivered at the seller's option will entitle the purchaser to all dividends

don, etc., Co., L. R. 5 Eq. 519; Stevens *v.* South Devon, etc., R. R. Co., 9 Hare 313. It then becomes a debt due from the corporation. Wheeler *v.* Northwestern, etc., Co., 39 Fed. R. 347.

[1] Wright *v.* Tuckett, 1 Johns. & H. (Eng. Ch.) 266; Hill *v.* Newichawanick Co., 71 N. Y. 593; Wheeler *v.* Northwestern, etc., Co., 39 Fed. R. 347; City of Ohio *v.* Cleveland, etc., R. Co., 6 Ohio St. 489. *Contra*, Burroughs *v.* North Carolina R. Co., 67 N. C. 376. In Kennedy *v.* First Nat. Bank, 115 N. C. 223, 20 S. E. R. 375, it was held that where a widow, to whom dividends were bequeathed during her life or widowhood, with remainder over to her daughter, consented to the transfer of the certificate of stock to the daughter, she waived all claim to the dividend.

[2] Brundage *v.* Brundage, 60 N. Y. 544; Black *v.* Homersham, L. R. 4 Exch. Div. 24; Curry *v.* Woodward, 44 Ala. 305. See, also, Cook *v.* Monroe, 45 Neb. 349, 63 N. W. R. 800, s. c. 11 Nat. Corp. R. 5.

[3] Collier *v.* Collier, 3 Ohio St. 369.

[4] Central R., etc., Co. *v.* Papot, 59 Ga. 342; Ryan *v.* Leavenworth, etc., Co., 21 Kan. 365, 403; Jermain *v.* Lake Shore, etc., R. Co., 91 N. Y. 483; March *v.* Eastern R. Co., 43 N. H. 515.

[5] Bailey *v.* Railroad Co., 22 Wall. (U. S.) 604, 637; March *v.* Eastern R. Co., 43 N. H. 515; Jones *v.* Terre Haute, etc., R. Co., 57 N. Y. 196; Goodwin *v.* Hardy, 57 Me. 143. If he acquires it by devise he takes all dividends declared after the death of his testator. Phelps *v.* Farmers', etc., Bank, 26 Conn. 269.

[6] Clapp *v.* Astor, 2 Edw. Ch. (N. Y.) 379.

[7] Bright *v.* Lord, 51 Ind. 272, s. c. 19 Am. R. 732.

declared after entering into the original contract of purchase.[1] And where an offer to sell shares is accepted before revocation, it has been held that the acceptor may claim all dividends declared after the date of the offer,[2] for the bargain is presumed to have been made with reference to the value of the shares at the time the offer was made. The corporation may generally pay the dividend to the person in whose name the stock is registered upon the books of the company[3] without inquiry,[4] and it will be protected even though he has transferred the shares.[5] But where the corporation has due notice of a transfer, it should pay the money only to the transferee,[6] and it may properly do so, even though he has not yet been registered as a stockholder.[7] If a stockholder dies, his administrator is the proper party to receive dividends on his stock,[8] for dividends declared before, though payable after the owner's death, belong to the estate, even as against the devisees of the stock.[9] His heirs, it is said, can only claim the dividends after they have procured the shares to be transferred to themselves.[10] Where the corporation closed its transfer books some days before the declaration of a dividend, parties who applied for and were refused registry while the books remained closed were held entitled to the dividend when declared.[11] If the corporation

[1] Currie *v.* White, 45 N. Y. 822; Black *v.* Homersham, L. R. 4 Exch. Div. 24. See, also, Phinizy *v.* Murray, 83 Ga. 747, s. c. 20 Am. St. R. 342.

[2] Harris *v.* Stevens, 7 N. H. 454. But see Hopper *v.* Sage, 112 N. Y. 530.

[3] Brisbane *v.* Delaware, etc., R. Co., 94 N. Y. 204; Cook *v.* Monroe, (Neb.) 63 N. W. R. 800, 11 Nat. Corp. R. 5; Cleveland, etc., R. Co. *v.* Robbins, 35 Ohio St. 483.

[4] Jones *v.* Terre Haute, etc., R. Co., 29 Barb. (N. Y.) 353; Northrop *v.* Newton, etc., Turnp. Co., 3 Conn. 544.

[5] Cleveland, etc., R. Co. *v.* Robbins, 35 Ohio St. 483; Bell *v.* Lafferty, 1 Pennypacker (Pa. Sup. Ct.) 454.

[6] Jones *v.* Terre Haute, etc., R. Co., 57 N. Y. 196, 205. Robinson *v.* National Bank, 95 N. Y. 637, where the corporation had improperly refused to register a transfer.

[7] 1 Cook on Stock and Stockholders, § 540. See, also, Gemmell *v.* Davis, 75 Md. 546, s. c. 23 Atl. R. 1032, 32 Am. St. R. 412.

[8] Brisbane *v.* Delaware, etc., R. Co., 94 N. Y. 204.

[9] De Gendre *v.* Kent, L. R. 4 Eq. 283.

[10] State *v.* New Orleans, etc., R. Co., 30 La. Ann. 308.

[11] Jones *v.* Terre Haute, etc. R. Co., 57 N. Y. 196, 205; Robinson *v.* National Bank, 95 N. Y. 637. Where the corporation is authorized by statute

should pay a dividend to a person as a stockholder, although he may have wrongfully held the stock, one claiming to be the real owner of the stock, but not an admitted stockholder, can not establish his right thereto in the first instance, it seems, by an action against the stockholder to recover such dividend, as for money had and received. His action to recover the dividend could only be maintained against the corporation, if it could be maintained at all, and he can not follow the assets into the hands of others without first establishing his rights as a creditor of the corporation.[1]

§ 307. **Rights of life tenant and remainderman — Apportionment of dividends.**—An ordinary cash dividend declared during the existence of the life tenancy goes, presumptively at least, to the life tenant;[2] but where stock is held in trust for a life tenant with remainder over, the rule has been laid down that all dividends declared from profits earned during the tenancy belong to the life tenant,[3] while extraordinary dividends amounting only to a distribution of a portion of the invested capital,[4] or a distribution of profits earned or accumu-

or by charter to close its books under such circumstances, the holding would, perhaps, be different. If the corporation refuses to transfer stock to a purchaser upon application regularly made, it has been held that he may maintain a suit against it for a dividend due on his stock, without first compelling a transfer of stock to him by a proceeding in equity. Hill *v.* Atoka, etc., Co., (Mo. Sup.) 21 S. W. R. 508. This case was afterwards reversed, however, by the court in banc, upon other grounds. The decision reversing it is found in 124 Mo. 153, s. c. 25 S. W. R. 926.

[1] Peckham *v.* Van Wagenen, 83 N. Y. 40, distinguishing LeRoy *v.* Globe Ins. Co., 2 Edw. Ch. (N. Y.) 657, and *In re* Le Blanc, 75 N. Y. 598. See, however, Cook *v.* Monroe, 45 Neb. 349, 63 N. W. R. 800, 11 Nat. Corp. R. 5.

[2] Richardson *v.* Richardson, 75 Me. 570, s. c. 46 Am. R. 428; Millen *v.* Guerrard, 67 Ga. 284; Bates *v.* MacKinley, 31 Beav. 280; 2 Thomp. Corp., §§ 2193, 2201. See, also, "The rule in Minot's Case," by Judge Corliss, in 33 Alb. L. Jour. 106.

[3] Earp's Appeal, 28 Pa. St. 368; Biddle's Appeal, 99 Pa. St. 278; Oliver's Estate, 136 Pa. St. 43, s. c. 20 Am. St. R. 894. If the last preceding dividend was made at a regular and reasonable time, before a cash dividend declared after the life estate arose, it will be given to the life tenant, regardless of the time when it was earned. Richardson *v.* Richardson, 75 Me. 570, s. c. 46 Am. R. 428; Jermain *v.* Lake Shore, etc., R. Co., 91 N. Y. 483; Barclay *v.* Wainewright, 14 Ves. 66.

[4] Vinton's Appeal, 99 Pa. St. 434;

lated before the tenancy arose,[1] belong to the remainderman. This rule is followed, either in whole or in part, in most of the states,[2] and can be objected to only because of the difficulty in applying it.[3] In Massachusetts,[4] Georgia,[5] Rhode Island,[6] and the District of Columbia,[7] the courts decline to look beyond the action of the directors in declaring the dividend, to ascertain who is entitled to it, but hold, in general, that a dividend payable in money shall be regarded as income, and given to

Heard *v.* Eldredge, 109 Mass. 258, s. c. 12 Am. R. 687; Gifford *v.* Thompson, 115 Mass. 478; Wheeler *v.* Perry, 18 N. H. 307.

[1] Pennsylvania Co. *v.* Dovey, 64 Pa. St. 260; Moss's Appeal, 83 Pa. St. 264; Smith's Estate, 140 Pa. St. 344, s. c. 23 Am. St. R. 237.

[2] See Cook on Stock and Stockholders, § 554; Van Doren *v.* Olden, 19 N. J. Eq. 176, s. c. 97 Am. Dec. 650; *In re* Kernochan, 104 N. Y. 618; Peirce *v.* Burrough, 58 N. H. 302; Hite's Ex'rs *v.* Hite's Devisees, 2 Ry. & Corp. L. J. (Ky.) 568; Hite *v.* Hite, 93 Ky. 257, 20 S. W. R. 778, s. c. 19 L. R. A. 173; Gilkey *v.* Paine, 80 Me. 319, s. c. 14 Atl. R. 205; Smith's Estate, 140 Pa. St. 344, s. c. 23 Am. St. R. 237; Cobb *v.* Fant, 36 S. Car. 1, 14 S. E. R. 959. The rule seems to be somewhat unsettled in New York. Compare Goldsmith *v.* Swift, 25 Hun 201; *In re* Warren, 11 N. Y. Supp. 787; Clarkson *v.* Clarkson, 18 Barb. 646; Simpson *v.* Moore, 30 Barb. 637; Riggs *v.* Cragg, 89 N. Y. 479, and *In re* Kernochan, 104 N. Y. 618.

[3] See Earp's Appeal, 28 Pa. St. 368. In 33 Alb. L. Jour. 427, Judge Corliss lays down the following rules upon this subject: "1. If the dividend is made up of profits, the dividend goes to the life tenant, irrespective of the form in which it is declared. 2. The life tenant is entitled to all dividends, whether in cash or in stock declared during the existence of his interest, whether they consist of profits which have accrued subsequently to the vesting of the life estate, or in part of earnings of the corporation which had accumulated at the time of the devolution upon the life tenant of his interest in the property. 3. That in so far as any dividend consists of money, derived from an increase in the value of the corporate property, or is derived from any source other than the net earnings of the company, the life tenant can claim no interest therein. 4. That not only is it beyond the power of the corporation to bind the life tenant by dividing net earnings in the form of capital stock, but the life tenant can always show the true nature and source of the dividend, in spite of any act or declaration to the contrary; and that on the other hand the remainderman may prove that a dividend which apparently belongs to the life tenant is in fact the property of the remainderman."

[4] Minot *v.* Paine, 99 Mass. 101; Daland *v.* Williams, 101 Mass. 571; New England Trust Co. *v.* Eaton, 140 Mass. 532. But see Davis *v.* Jackson, 152 Mass. 58, s. c. 25 N. E. R. 21.

[5] Millen *v.* Guerrard, 67 Ga. 284, construing Code Ga., § 2256.

[6] Parker *v.* Mason, 8 R. I. 427; Petition of Brown, 14 R. I. 371.

[7] Gibbons *v.* Mahon, 4 Mackey 130, s. c. 54 Am. R. 262.

the life tenant, while a dividend payable in stock shall be regarded as capital and given to the remainderman,[1] since it is thought unwise to attempt to ascertain how the corporation came by the funds out of which either cash or stock dividends are declared,[2] and since a stock dividend does not, as a rule, increase the interest of the shareholders in the property of a corporation, but merely dilutes their shares and is only a new evidence of their interests.[3] For this reason it is held that such a dividend generally constitutes capital rather than income, and goes to the remainderman.[4] It has also been held that new shares of preferred stock issued in double the amount of the old shares, but at one-half the rate of interest, in compromise of claims of the holders for back and unpaid dividends, constitute capital and not income as between the life tenant and remainderman.[5] A strict adherence to this rule would so clearly be productive of hardship and injustice that some modifications have been engrafted upon it in Massachusetts, where it was first announced, and it is held that the court will take into consideration the whole character of the property and the transaction, with due regard to all the facts preceding, attending, and resulting from the declaration of the dividend, in order to determine whether the dividend rightfully belongs to the owner of the stock or to the owner of the income.[6] Accordingly, it is held that a dividend payable in stock purchased with the surplus earnings of the corporation belongs absolutely to the life tenant,[7] and that a cash dividend of forty per cent., for the payment of which no fund is provided, but which is declared to be receivable in payment for shares of stock issued under a power to increase the capital stock, is virtually a stock dividend, and must go to the remainderman,[8] as must also the compensation paid

[1] Minot *v.* Paine, 99 Mass. 101.

[2] Boston, etc., R. Co. *v.* Commonwealth, 100 Mass. 399.

[3] Gibbons *v.* Mahon, 136 U. S. 549.

[4] Terry *v.* Eagle Lock Co., 47 Conn. 141; Spooner *v.* Phillips, 62 Conn. 62, s. c. 16 L. R. A. 461, and note; Millen *v.* Guerrard, 67 Ga. 292; Greene *v.* Smith, 17 R. I. 28, s. c. 19 Atl. R. 1081.

[5] Mills *v.* Britton, 64 Conn. 4, 24 L. R. A. 536.

[6] Daland *v.* Williams, 101 Mass. 571; Rand *v.* Hubbell, 115 Mass. 461.

[7] Leland *v.* Hayden, 102 Mass. 542.

[8] Daland *v.* Williams, 101 Mass. 571.

to the corporation for a part of its real estate taken by right of eminent domain, and distributed to the stockholders as a cash dividend.[1] In England, the courts originally followed the rule that regular cash dividends belong to the life tenant as income, while extraordinary dividends, or bonuses, belong to the remainderman,[2] but the tendency at the present time seems to be to hold the action of the corporation conclusive, so that, if it declares even an extraordinary dividend during the existence of the life tenancy, it goes to the life tenant, and if it treats the earnings as capital they will not go to the life tenant.[3] A bonus, however, which is paid from profits that have been fraudulently retained to the prejudice of the rights of the life tenant, will be given to him as income deferred.[4] The rules to which we have referred are those announced by the courts in their endeavor to accomplish justice in the absence of any statute authorizing an apportionment, and in the absence of any clearly expressed intention on the part of the grantor or testator. Where the intent of the grantor or testator is clearly apparent, it will control, and the courts will be guided by it.[5] In case the life tenant dies before a dividend is declared, the general rule is that it can not be apportioned, but belongs wholly to the remainderman.[6] But in England[7] and in several states in this country,[8] dividends are made apportionable by

[1] Heard *v.* Eldredge, 109 Mass. 258.

[2] Brander *v.* Brander, 4 Vesey 800; Paris *v.* Paris, 10 Vesey, Jr., 185; Irving *v.* Houstoun, 4 Paton Scotch H. of L. 521; Murray *v.* Glasse, 17 Jur. 816.

[3] Bouch *v.* Sproule, L.R. 12 App. Cas. 385, 397; *In re* Barton's Trust, L. R. 5 Eq. 238; Price *v.* Anderson, 15 Sim. 473; Ellis *v.* Barfield, 64 L. T. R. 625. But see Sugden *v.* Alsbury, 63 L. T. R. 576.

[4] Maclaren *v.* Stainton, L. R. 11 Eq. 382; Dale *v.* Hayes, 40 L. J. Chan. 244; Edmondson *v.* Crosthwaite, 34 Beav. 30.

[5] *In re* Bouch, L. R. 29 Chan. Div. 635; Reed *v.* Head, 6 Allen (Mass.) 174; Clarkson *v.* Clarkson, 18 Barb. (N. Y.) 646; Millen *v.* Guerrard, 67 Ga. 284; Thomson's Appeal, 89 Pa. St. 36; Gibbons *v.* Mahon, 136 U. S. 549; Bushee *v.* Freeborn, 11 R. I. 149.

[6] King *v.* Follett, 3 Vt. 385; Granger *v.* Bassett, 98 Mass. 462; Brundage *v.* Brundage, 60 N. Y. 544, 551; Pearly *v.* Smith, 3 Atk. 260 (1745); Scholefield *v.* Redfern, 2 Drew. & Sm. 173; Quinn *v.* Madigan, 65 N. H. 8, s. c. 17 Atl. R. 976. But compare Johnson *v.* Bridgewater, etc., Co., 14 Gray (Mass.) 274.

[7] 33 and 34 Vict. Ch. 35, § 2; Beavan *v.* Beavan, 53 L. T. Rep. 245.

[8] Stimson's Am. Law (1886), § 2027.

statute, while in one or two states there is a tendency to hold dividends apportionable at common law.[1] The worth or value of a privilege accorded to shareholders of taking new shares upon an increase of the capital stock, belongs to the remainderman,[2] but the income from the money received upon the sale of such a privilege, or from the stock which is taken by the trustee under such a privilege for the benefit of the trust, belongs, it seems, to the life tenant.[3]

§ 308. **Duties of life tenant — Transfers.** — The calls which are made during the continuance of his estate must, generally, be paid by the life tenant,[4] who must also keep down taxes on the stock.[5] He is not entitled to have the stock transferred to him on the corporate books,[6] and the corporation may be held liable to the remainderman for enabling the life tenant to dispose of the shares to his injury.[7] But the life tenant may hold the administrator permitting a transfer[8] or the corporation making it[9] (where it has notice of the trust) liable for his interest in shares transferred in fraud of his rights.

§ 309. **Dividend is not property of the corporation—Rights of creditors and stockholders.**—From the time a dividend becomes due it ceases to be a part of the property of the corpo-

[1] *Ex parte* Rutledge, 1 Harper's Eq. (S. C.) 65, s. c. 14 Am. Dec. 696; Wilson's Appeal, 108 Pa. St. 344. See, also, Smith's Estate, 140 Pa. St. 344, s. c. 23 Am. St. R. 237.

[2] Atkins *v.* Albree, 94 Mass. 359; Brinley *v.* Grou, 50 Conn. 66, s. c. 47 Am. R. 618; Biddle's Appeal, 99 Pa. St. 278; Goldsmith *v.* Swift, 25 Hun (N. Y.) 201; Sanders *v.* Bromley, 55 L. T. R. (N. S.) 145; *In re* Kernochan, 104 N. Y. 618; Hite *v.* Hite, 93 Ky. 257, 20 S. W. R. 878, s. c. 19 L. R. A. 173. But see Wiltbank's Appeal, 64 Pa. St. 256, s. c. 3 Am. R. 585.

[3] Moss's Appeal, 83 Pa. St. 264, s. c. 24 Am. R. 164; 1 Cook on Stock and Stockholders, § 559, and cases cited in preceding note.

[4] *Re* Box's Trusts, 9 L. T. (N. S.) 372. But the testator's estate is liable for a call which becomes due the day after his death. Emery *v.* Wason, 107 Mass. 507.

[5] Citizens' Mut. Ins. Co. *v.* Lott, 45 Ala. 185; Webb *v.* Town of Burlington, 28 Vt. 188.

[6] Collier *v.* Collier, 3 Ohio St. 369; State *v.* Robinson, 57 Md. 486.

[7] Caulkins *v.* Memphis, etc., Co., 85 Tenn. 683, s. c. 4 S. W. R. 287.

[8] Keeney *v.* Globe Mill Co., 39 Conn. 145.

[9] Stewart *v.* Firemen's Ins. Co., 53 Md. 564.

ration.[1] The creditors of the corporation can not claim it in preference to the stockholder,[2] even though the corporation may have become insolvent after the money was in good faith set apart with which to pay it, but before it was actually paid.[3] Where a sufficient surplus is on hand with which to pay the dividend at the time it is declared, but before it is due this surplus is swept away by fraud of one of the officers, or by other unforeseen circumstances, it has been held that the corporation may be restrained from paying dividends out of its other funds.[4] And where no specific fund is set apart for the payment of dividends, a shareholder who has not claimed or received his money before the corporation becomes insolvent, has, it seems, but a claim against the corporation, to be enforced like those of other creditors.[5] A specific fund deposited in bank for the payment of dividends which have been lawfully declared, can not be reclaimed by the corporation or by a receiver,[6] but can be used only for that purpose, though it will be and remain at the risk of the corporation until a reasonable time after notice is given to the stockholder.[7] If the bank fails after such a reasonable time has elapsed, the loss will fall upon the stockholder.[8]

§ 310. **Dividend is irrevocable—Actions concerning.**—A dividend once legally declared can not be revoked,[9] unless,

[1] But until the dividend is declared, corporate profits belong to the corporation and may be seized by its creditors. Curry *v.* Woodward, 44 Ala. 305; Hyatt *v.* Allen, 56 N. Y. 553; Rand *v.* Hubbell, 115 Mass. 461, 474.

[2] Van Dyck *v.* McQuade, 86 N. Y. 38.

[3] As where a great fire rendered an insurance company insolvent. Le Roy *v.* Globe Ins. Co., 2 Edw. Ch. (N. Y.) 657.

[4] Fawcett *v.* Laurie, 1 Dr. & Sm. 192.

[5] Lowne *v.* American Fire Ins. Co., 6 Paige (N. Y.) 482; Curry *v.* Woodward, 44 Ala. 305.

[6] Matter of Le Blanc, 14 Hun 8; Beers *v.* Bridgeport Spring Co., 42 Conn. 17. The stockholder may follow the fund.

[7] King *v.* Paterson, etc., R. Co., 29 N. J. L. 82 and 504.

[8] King *v.* Paterson, etc., R. Co., 29 N. J. L. 82 and 504.

[9] Beers *v.* Bridgeport Spring Co., 42 Conn. 17. See, also, Armant *v.* New Orleans, etc., R. R. Co., 41 La. Ann. 1020, s. c. 7 So. R. 35. But it has been held that where dividends have been improperly and unlawfully paid they may be reclaimed. Lexington, etc., Co. *v.* Page, 17 B. Mon. (Ky.) 412, s. c. 66 Am. Dec. 165; Slayden *v.* Seip, 25 Mo. App. 439, 446. See, also, McKusick

perhaps, where no fund has been set apart, and the declaration is rescinded before it is made public, and before the time fixed for the payment of the dividend.[1] It becomes a debt due from the corporation which may be enforced by action at law,[2] like any other debt. But only the owner of the stock can maintain an action for this cause. Mere possession of the certificate, or even a special property therein, is not always enough.[3] Such an action should, ordinarily, be brought against the corporation as such, and not against the corporate officers,[4] and should be preceded by a demand for payment.[5] But a stockholder can not, as a rule at least, sue for profits until a dividend has been declared,[6] even though the dividends have been guaranteed to the corporation by another corporation which has leased the road.[7] The mere fact that profits may have

v. Seymour, etc., Co., 48 Minn. 172, s. c. 50 N. W. R. 1116. And the right to reclaim a dividend, paid by an insolvent corporation, passes to its assignee if the terms of the assignment are sufficiently comprehensive. Main *v.* Mills, 6 Biss. (U. S.) 98; Lexington, etc., Co. *v.* Page, 17 B. Mon. (Ky.) 412; s. c. 66 Am. Dec. 165.

[1] Ford *v.* Easthampton, etc., Co., 158 Mass. 84, s. c. 32 N. E. R. 1036.

[2] Coey *v.* Belfast, etc., R. Co., Irish R., 2 C. L. 112; King *v.* Paterson, etc., R. Co., 29 N. J. L. 504; West Chester, etc., R. Co. *v.* Jackson, 77 Pa. St. 321; City of Ohio *v.* Cleveland, etc., R. Co., 6 Ohio St. 489; State *v.* Baltimore, etc., R. Co., 6 Gill (Md.) 363; Jones *v.* Terre Haute, etc., R. Co., 57 N. Y. 196; Keppel's Adm'r *v.* Petersburg R. Co., Chase's Dec. (U. S.) 167; Dalton *v.* Midland Counties R. Co., 13 C. B. 474. But see Fawcett *v.* Laurie, 1 Dr. & Sm. 192, as to the case of a loss of all the profits after the dividend is declared and before it is paid.

[3] Dow *v.* Gould, etc., Min. Co., 31 Cal. 629. See, also, Berford *v.* New York Iron Mine, 56 N. Y. Super. Ct. R. 236.

[4] French *v.* Fuller, 23 Pick. (Mass.) 108; Smith *v.* Poor, 40 Me. 415, s. c. 63 Am. Dec. 672. But where the treasurer retained dividends under claim that he was the owner of the shares, an action against him individually was sustained. Williams *v.* Fullerton, 20 Vt. 346. But see Peckham *v.* Van Wagenen, 83 N. Y. 40.

[5] State *v.* Baltimore, etc., R. Co., 6 Gill (Md.) 363; King *v.* Paterson, etc., R. Co., 29 N. J. L. 504; Bank of Louisville *v.* Gray, 84 Ky. 565; Scott *v.* Central R., etc., Co. of Ga., 52 Barb. (N. Y.) 45, where a letter of inquiry was held an insufficient demand. The suit has been held a sufficient demand of itself. Keppel's Adm'r *v.* Petersburg R. Co., Chase's Dec. (U. S.) 167; Robinson *v.* National Bank, etc., 95 N. Y. 637.

[6] Beveridge *v.* New York, etc., R. Co., 112 N. Y. 1.

[7] Flagg *v.* Manhattan Ry. Co., 10 Fed. R. 413, s. c. 21 Am. Law. Reg. (U. S.) 775; Beveridge *v.* New York, etc., R. R. Co., 112 N. Y. 1; Harkness *v.* Man-

arisen from the transaction of the corporate business gives him no absolute right to an immediate distribution thereof in the way of dividends.[1] If suits be brought by different parties to recover the same dividend, the corporation may require them to interplead.[2] The corporation can not defend against a suit for such a dividend, on the ground that it had no legal authority to declare a dividend, where dividends have been paid to a majority of the stockholders and are retained by them.[3] But where the corporation has a lien on the shares for a debt due it from the stockholder, it may set up the debt by way of set-off or counter-claim.[4]

§ 311. **Demand—Necessity and effect of.**—Interest can only be recovered from the time of a demand and refusal to pay the dividend after it has been declared and becomes due,[5] and the

hattan R. R. Co., 54 N. Y. Super. Ct. 174. And it has been held that an agreement to pay a shareholder a certain specified dividend each year is *ultra vires* and can not be enforced. Elevator Co. *v.* Memphis, etc., R. R. Co., 85 Tenn. 703. But see Taft *v.* Hartford, etc., R. R. Co., 8 R. I. 310, s. c. 5 Am. R. 575, and *ante*, §§ 81, 82.

[1] Beveridge *v.* New York El. R. R. Co., 112 N.Y.1; Phelps *v.* Farmers', etc., Bank, 26 Conn. 269; Minot *v.* Paine, 99 Mass. 101. See, also, Gordon *v.* Richmond, etc., R. R. Co., 78 Va. 501.

[2] Salisbury Mills *v.* Townsend, 109 Mass. 115.

[3] Stoddard *v.* Shetucket Foundry Co., 34 Conn. 542. And where the minutes of the meeting, at which the dividend was alleged to have been declared, showed that a resolution declaring a dividend was offered and seconded, but failed to show its adoption, it was held competent to prove that the dividend was really declared by proof that each officer of the company had acted on the assumption that the resolution had been adopted, and that, in accordance therewith, every stockholder, with the exception of plaintiff, had received his *pro rata* share of the dividend. Southwestern, etc., R. Co. *v.* Martin, 57 Ark. 355.

[4] King *v.* Paterson, etc., R. Co., 29 N. J. L. 504. It is held that a lien upon dividends may still exist after the lien upon shares is taken away by statute. Hagar *v.* Union Nat. Bank, 63 Me. 509. It is held that no such lien can be claimed upon dividends due the estate of a deceased shareholder. Merchants' Bank *v.* Shouse, 102 Pa. St. 488; Brent *v.* Bank, etc., 2 Cranch C. C. (U. S) 517. Nor can a set-off be claimed where the shares have been assigned, with the knowledge of the corporation, before the declaration of the dividend. Gemmell *v.* Davis, 75 Md. 546, s. c. 23 Atl. R. 1032, 32 Am. St. R. 412.

[5] Keppels' Adm'r *v.* Petersburg R. Co., Chase's Dec. (U. S.) 167; Boardman *v.* Lake Shore, etc., R. Co., 84 N. Y. 157, 187; State *v.* Baltimore, etc., R. Co., 6 Gill (Md.) 363, 387; Philadelphia, etc., R. Co. *v.* Cowell, 28 Pa. St. 329. A different rule is ap-

statute of limitation will only run from that time.[1] So, it has been held in Louisiana that prescription will not run against a person who is ignorant of his right to dividends, except from the date when he learns of his supposed claim and makes a demand, since dividends are payable only on demand, and can not be said to be due until demanded.[2] A demand is sufficient if made upon the bank or person through whom the dividend is payable.[3]

§ 312. Declaration of dividend discretionary with directors. —In general, the determination of the question whether a dividend shall be declared rests in the discretion of the directors,[4] and they may invest the profits to properly extend or develop the business,[5] or to provide for the payment of

plied to dividends on preferred stock not paid when due. See Boardman *v.* Lake Shore, etc., R. Co., 84 N. Y. 157. And it has been said that in New York interest is not dependent on demand. Prouty *v.* Michigan Southern, etc., R. Co., 1 Hun (N. Y.) 655, 657; Adams *v.* Fort Plain Bank, 36 N. Y. 255.

[1] State *v.* Baltimore, etc., R. Co., 6 Gill (Md.) 363; Philadelphia, etc., R. Co. *v.* Cowell, 28 Pa. St. 329, s. c. 70 Am. Dec. 128.

[2] Armant *v.* New Orleans, etc., R. Co., 41 La. Ann. 1020, s. c. 7 So. R. 35. This was a case in which a company, on re-organization, was granted a new charter providing that dividends not claimed within three years should be forfeited, and an old stockholder who did not know of his rights nor of the re-organization was held not to be affected by this provision, until, being apprised of his rights and liabilities, he asserted his claim to dividends by making a demand.

[3] King *v.* Paterson, etc., R. Co., 29 N. J. Law 504.

[4] Howell *v.* Chicago, etc., Co., 51 Barb. (N. Y.) 378; Ely *v.* Sprague, Clarke Ch. (N. Y.) 351; Barnard *v.* Vermont, etc., R. Co., 7 Allen (Mass.) 512; Chaffee *v.* Rutland R. Co., 55 Vt. 110; Field *v.* Lamson, etc., Co., 162 Mass. 388, 38 N. E. R. 1126, 27 L. R. A. 136; Browne *v.* Monmouthshire R., etc., Co., 13 Beav. 32; McLean *v.* Pittsburgh, etc., Co., 159 Pa. St. 112, s. c. 28 Atl. R. 211; State *v.* Baltimore, etc., R. Co., 6 Gill (Md.) 363; Hunter *v.* Roberts, 83 Mich. 63, s. c. 47 N. W. R. 131, 9 Ry. & Corp. L. J. 90, 31 Am. & Eng. Corp. Cas. 349. The discretion of the directors in controlling the policy of the corporation as to the payment of cash dividends, if honestly exercised, will not be interfered with by the courts. Zellerbach *v.* Allenberg, 99 Cal. 57; Excelsior, etc., Co. *v.* Pierce, 90 Cal. 131, s. c. 27 Pac. Rep. 44. But this discretion may be limited by law or contract. Park *v.* Grant Locomotive Works, 40 N. J. Eq. 114, s. c. 3 Atl. Rep. 162. Compare American Wire Nail Co. *v.* Gedge, (Ky.) 29 S. W. R. 353.

[5] Pratt *v.* Pratt, 33 Conn. 446; Durfee *v.* Old Colony, etc., R. R. Co., 5 Allen (Mass.) 230. Where a dividend has been declared and partly paid,

future indebtedness, subject only to the rule that they must act in good faith and within the limits of the corporate powers.[1] In England, however, they are required by statute to report the condition of the company to the stockholders and to be guided by their determination as to when a dividend shall be declared.[2] Some authorities hold that the company should increase its capital before extending its business, and that the directors, by taking its earnings for the latter purpose, commit a gross violation of duty; and that in case the earnings have been so used by them they should increase the capital stock and issue a stock dividend,[3] or borrow as much money as has been used in improvements to replace the profits which have been improperly diverted.

§ 313. Power to borrow money or declare stock dividend. —It is the general rule that the company, where it has used profits for improvements, may lawfully borrow an equivalent sum of money with which to pay a dividend,[4] or it may, when it has authority to increase its capital stock, declare a stock dividend.[5] The corporation may, in general, it is said, borrow

the corporation can not defeat the payment of the rest by investing the remainder of the profits in permanent improvements. Beers *v.* Bridgeport Spring Co., 42 Conn. 17; Miller *v.* Illinois Central R. Co., 24 Barb. (N. Y.) 312. But it has been held that a dividend may be declared for a fiscal year, subsequent to that in which the profits were earned. Mills *v.* Northern R. R. Co., L. R. 5 Ch. App. Cas. 621.

[1] Karnes *v.* Rochester, etc., R. Co., 4 Abb. Prac. (N. Y.) N. S. 107, the court saying: "The court can not undertake to say judicially that the future business of the corporation will be prosperous; nor has it any right to postpone the rights and claims of creditors to future earnings and accumulations, even if it could be certain they would accrue." Belfast, etc., R. Co. *v.* City of Belfast, 77 Me. 445; Lord *v.* Brooks, 52 N. H. 72; March *v.* Eastern, Ry. Co., 43 N. H. 515. This rule is adhered to very strictly where holders of common stock seek to have a dividend declared, but where holders of preferred stock seek to enforce their rights, the courts sometimes depart very far from this rule in their efforts to assist them.

[2] 8 Vic. Ch. 16, § 120.

[3] Hoole *v.* Great Western R. Co., L. R. 3 Ch. App. Cas. 262.

[4] Mills *v.* Northern R., etc., Co., L. R. 5 Chan. App. 621.

[5] City of Ohio *v.* Cleveland, etc., R. Co., 6 Ohio St. 489; Williams *v.* Western Union Tel. Co., 93 N. Y. 162; Howell *v.* Chicago, etc., R. Co., 51 Barb. (N. Y.) 378; Boston, etc., R. Co. *v.* Commonwealth, 100 Mass. 399; Gordon's Ex. *v.* Richmond, etc., R.

money to pay a dividend when a fair estimate of its assets and liabilities shows an excess of assets equal to the amount of the proposed dividend,[1] since the profits of the corporation for the purpose of declaring a dividend may fairly be estimated to consist in the excess of its cash and other property on hand over its liabilities.[2]

§ 314. **Remedies for abuse of discretion.**—The usual remedy for an abuse of discretion in using the profits and failing to declare dividends is by electing other directors,[3] and the court will take into account the fact that not only this course, but also that of disposing of his shares, is open to an aggrieved shareholder.[4] But still a court of equity will exercise a supervisory power in this matter, and may, at the instance of any shareholder, compel the proper authorities to declare and pay the dividend, in cases where there is a clear abuse of power in refusing to do so.[5] This power is most

Co., 78 Va. 501; Commonwealth *v.* Pittsburg, etc., R. Co., 74 Pa. St. 83; State *v.* Baltimore, etc., R. Co., 6 Gill (Md.) 363. Such a dividend, it is said, may be revoked at any time before certificates are issued. Terry *v.* Eagle Lock Co., 47 Conn. 141. In England such a dividend is held to be *ultra vires*, and in some of the states it is prohibited by constitutional provision. Hoole *v.* Great Western R. Co., L. R. 3 Ch. App. 262.

[1] Stringer's Case, L. R. 4 Ch. 475.

[2] Hubbard *v.* Weare, 79 Iowa 678, s. c. 44 N. W. 915; Miller *v.* Bradish, 69 Iowa 278.

[3] Jermain *v.* Lake Shore, etc., R. Co., 91 N. Y. 483; Karnes *v.* Rochester, etc., R. Co., 4 Abb. Pr. (N. Y) N. S. 107; Chaffee *v.* Rutland, etc., R. R. Co., 55 Vt. 110; Barnard *v.* Vermont, etc., R. Co., 7 Allen (Mass.) 512; Brown *v.* Monmouthshire, etc., R. Co., 13 Beav. 32, s. c. 15 Jur. 475.

[4] Barry *v.* Merchants' Exchange Co., 1 Sandf. Chan. (N. Y.) 280.

[5] Stevens *v.* South Devon R. Co., 9 Hare, 313; Brown *v.* Buffalo, etc., R. Co., 27 Hun (N. Y.) 342; Boardman *v.* Lake Shore, etc., Ry. Co., 84 N. Y. 157; Hiscock *v.* Lacy, 30 N. Y. Supp. 860. But not where the stockholder waits until after the corporation has become insolvent before bringing his suit. Scott *v.* Eagle Fire Ins. Co., 7 Paige (N. Y.) 198. And it is held in Massachusetts that no equitable relief can be granted against a foreign corporation having neither officers nor place of business in that state for a failure to declare and pay dividends according to the stipulations of their certificates of stock. Williston *v.* Michigan Southern, etc., R. Co., 13 Allen (Mass.) 400. In determining the question the object of the corporation and the condition of its affairs will be considered. Fougeray *v.* Cord, 50 N. J. Eq. 185, s. c. 24 Atl. R. 499. Ordinarily, however, the directors can not be compelled, by mandamus, to pay a dividend. People *v.* Central, etc., Co., 41 Mich. 166.

often invoked by the holders of preferred shares, when the action of the directors threatens to rob them of their preference. Thus, in a recent case,[1] it appeared that by the terms of the subscription contract the holders of preferred stock in the defendant company were entitled to a dividend from net profits each year during which they were earned, but not to cumulative dividends, and that the arrearages of one year were not payable out of the earnings of subsequent years. It was held that an attempt on the part of the directors to accumulate money for the payment of the funded indebtedness, by refusing to pay any dividends on preferred stock through a long term of years, after which the income from the road might be expected to be great enough to pay to the holders of common stock the same dividends that holders of preferred stock would be entitled to receive, was unjustifiable and a violation by the directors of their legal duty, and the court ordered the payment of a dividend to the preferred shareholders out of the income for the current year, after the corporate expenses and interest on the funded debt had been paid.[2] But one who is not a stockholder can not obtain a decree compelling the corporation to declare and pay such dividends as shall appear upon an accounting to have been earned.[3]

§ 315. **Limitations upon authority to declare a dividend—Suits to reclaim.**—There are also many limitations upon the legal authority of the directors to declare a dividend. In Virginia, it is held that directors who have failed to declare dividends at the time fixed by the charter can not declare one for each of a number of years and so reduce the size of the dividends.[4]

[1] Hazeltine *v.* Belfast, etc., R. R. Co., 79 Me. 411.

[2] See, also, Richardson *v.* Vermont, etc., R. R. Co., 44 Vt. 613; West Chester, etc., R. R. Co. *v.* Jackson, 77 Pa. St. 321; Nickals *v.* New York, etc., R. R. Co., 15 Fed. R. 575, and compare Williston *v.* Michigan Southern R. R. Co., 13 Allen (Mass.) 400; Belfast, etc., R. R. Co. *v.* Belfast, 77 Me. 445.

[3] Berford *v.* New York Iron Mine, 56 N. Y. Super. Ct. R. 236.

[4] Gordon *v.* Richmond, etc., R. Co., 78 Va. 501. In this case the common shareholders claimed the right to have such dividends paid to them as would equal the dividends received by the preferred shareholders for a series of twelve years past, before any further payments were made to the preferred shareholders.

A valid dividend can in no case be declared and paid when the corporation is insolvent,[1] but can only be lawfully declared when sufficient net profits have been earned to pay it. And if payment of the dividend will consume any portion of the capital stock of the company, such dividend may be held fraudulent and void,[2] and, if paid, so much of the capital as was consumed in the payment may be recovered back[3] by suit in equity[4] brought by any corporate creditor who holds a judgment against the corporation upon which an execution has been returned unsatisfied.[5] So, a receiver may recover money paid as a dividend while the company was insolvent.[6] And it has been held that the directors themselves may reclaim dividends which have been illegally declared under a misapprehension of the right to declare them, and which have been paid to the shareholders.[7] The stockholder is bound to take notice of the condition of the corporation,[8] and it has been held that his private property may be reached

[1] Dividends paid when the company is insolvent may be recovered back from the stockholders. Osgood *v.* Laytin, 3 Keyes (N. Y.) 521; Slayden *v.* Seip, etc., Co., 25 Mo. App. 439.

[2] Chaffee *v.* Rutland, etc., R. Co., 55 Vt. 110; Elkins *v.* Camden, etc., R. Co., 36 N. J. Eq. 233; Pittsburg, etc., R. Co. *v.* County of Allegheny, 63 Pa. St. 126; Carpenter *v.* New York, etc., R. Co., 5 Abb. Prac. (N. Y.) 277; Lockhart *v.* Van Alstyne, 31 Mich. 76. But see Verner *v.* General, etc., Trust (L. R. 1894), 2 Ch. 239.

[3] Railroad Company *v.* Howard, 7 Wall. (U. S.) 392; Johnson *v.* Laflin, 5 Dill (U. S.) 65, 85, note; Hastings *v.* Drew, 76 N. Y. 9; McKusick *v.* Seymour, etc., Co., 48 Minn. 172, s. c. 50 N. W. R. 1116; Heman *v.* Britton, 88 Mo. 549; Story's Eq. Juris. (13th ed.), § 1252. The corporation should be made a party to the bill. First Nat. Bk., etc., *v.* Smith, 6 Fed. R. 215.

[4] The creditor should file a bill in the nature of a creditor's bill in favor of himself and all other creditors that may choose to come in and share the expense of the suit. Hastings *v.* Drew, 76 N. Y. 9; Bank of St. Mary's *v.* St. John, 25 Ala. 566; First Nat. Bank *v.* Smith, 6 Fed. R. 215.

[5] Cook on Stock and Stockholders, § 548. But creditors of an insolvent corporation can not, ordinarily, require the stockholders to surrender dividends paid by it when it was solvent. Reid *v.* Eatonton Co., 40 Ga. 98; *In re* Mercantile, etc., Co., L. R. 4 Ch. 475; Main *v.* Mills, 6 Biss. (U. S.) 98.

[6] Osgood *v.* Layton, 3 Keyes (N. Y.) 521. Compare Van Duyck *v.* McQuade, 86 N. Y. 45.

[7] Lexington, etc., Co. *v.* Page, 17 B. Mon. (Ky.) 412, s. c. 66 Am. Dec. 165. This decision, however, seems questionable.

[8] Peterson *v.* Illinois, etc., Co., 6 Bradw. (Ill.) 257; Clapp *v.* Peterson,

in such an action by the creditors,[1] even though he was in reality ignorant of the fact that payment of his dividend would impair the capital stock. The statute of limitations will run from the time the dividend is declared in favor of a shareholder who receives such a dividend in good faith and without actual notice.[2] If compelled to pay more than his equitable proportion of such a debt, the stockholder may enforce contribution by his associates;[3] and a stockholder who became possessed of his shares after such a dividend was paid can not be held liable in such a suit.[4]

§ 316. **Dividends should be paid out of the profits.** — The rule is often stated as requiring all dividends to be paid out of the net profits of the company, and this rule is generally correct when net profits are interpreted to mean that portion of the income which remains after the deduction of all proper charges and outlays,[5] including interest, and the like.[6] But the corporation is not required to be absolutely free from debt before paying dividends;[7] indeed, a contrary rule would prevent almost every railroad in the country from paying dividends.[8]

104 Ill. 26; Osgood *v.* Laytin, 48 Barb. (N. Y.) 463; Bank of St. Mary's *v.* St. John, 25 Ala. 566.

[1] Bartholomew *v.* Bentley, 15 Ohio 659. As to the stockholder's liability in a proceeding by creditor's bills to reach dividends paid after the corporation was insolvent or in contemplation of insolvency, see Railroad Co. *v.* Howard, 7 Wall. (U. S.) 392; Pacific R. Co. *v.* Cutting, Jr., 27 Fed. R. 638; Hastings *v.* Drew, 76 N. Y. 9; Heman *v.* Britton, 88 Mo. 549; Lexington, etc., Ins. Co. *v.* Page, 17 B. Mon. (Ky.) 412.

[2] Lexington, etc., Ins. Co. *v.* Page, 17 B. Mon. 412, s. c. 66 Am. Dec. 165.

[3] Bartlett *v.* Drew, 57 N. Y. 587.

[4] Hurlbut *v.* Tayler, 62 Wis. 607.

[5] St. John *v.* Erie R. Co., 22 Wall. (U. S.) 136; Miller *v.* Bradish, 69 Iowa 278, s. c. 28 N. W. 594. See, also, New York, etc., R. Co. *v.* Nickals, 119 U. S. 296. The net profits have been held to be the income remaining after the payment of operating expenses, and before the payment of interest. Corry *v.* Londonderry, etc., R. Co., 29 Beav. 263. But it is doubted if interest on debentures can be charged to capital, and the fund for the payment of dividends thereby increased. Bloxam *v.* Metropolitan R. Co., L. R. 3 Ch. App. Cas. 337, 344, 350.

[6] See Mobile, etc., R. Co. *v.* Tennessee, 153 U. S. 486, s. c. 14 Sup. Ct. R. 968. Except in cases where a portion of the capital is distributed upon a reduction of capital stock. See Strong *v.* Brooklyn, etc., R. Co., 93 N. Y. 426.

[7] Mills *v.* Northern, etc., R. Co., L. R. 5 Ch. App. Cas. 621.

[8] In support of the text see, also, Belfast, etc., R. Co. *v.* Belfast, 77 Me.

The debts which the company is authorized to carry while paying dividends are funded debts, and others of that class. Debts owing to contractors, and money due to bankers and others for advances made to aid in building the road, must be defrayed before dividends are declared,[1] though these debts may, in the discretion of the directors, be converted into funded indebtedness where this is practicable.[2] But dividends must ordinarily be paid only out of *earnings*,[3] and, unless the contrary is provided by charter or by statute, so, as a general rule, must interest upon stock when it is allowed.[4] Consequently, it is unlawful for a company which has not yet earned any income to declare a dividend upon its ordinary stock out of a sum of money paid to it as penalty and interest by the contractors, upon a failure to complete the company's lines according to agreement.[5] An absolute agreement to pay interest upon stock, where it is not expressly authorized by statute, has been held void,[6] although it is perfectly competent in this country for a railroad company to contract that it will, whenever the surplus earnings shall enable it to do so out of such earnings, pay interest on the stock subscriptions for the time the road is building and until it is ready for operation.[7]

§ 317. **Enjoining payment of dividends.**—An injunction will not issue at the instance of corporate creditors to restrain acts tending to decrease the corporate assets where it is not shown

445; Hazeltine *v.* Belfast, etc., R. Co., 79 Me. 411; Miller *v.* Bradish, 69 Iowa 278, s. c. 28 N. W. 594.

[1] Wood's R. Law, 168.

[2] Belfast, etc., R. Co. *v.* Belfast, 77 Me. 445, s. c. 23 Am. & E. R. Cas. 736, 740.

[3] Bloxham *v.* Metropolitan R. Co., L. R. 3 Ch. App. Cas. 337.

[4] Macdougall *v.* Jersey, etc., Co., 2 Hem. & M. 528; Salisbury *v.* Metropolitan R. Co., 38 L. J. Ch. 249.

[5] Bloxham *v.* Metropolitan R. Co., L. R. 3 Ch. App. Cas. 337.

[6] McLaughlin *v.* Detroit, etc., R. Co., 8 Mich. 100; Pittsburg, etc., R. Co. *v.* Allegheny Co., 63 Pa. St. 126; Painsville, etc., R. Co. *v.* King, 17 Ohio St. 534; Troy, etc., R. Co. *v.* Tibbitts, 18 Barb. (N. Y.) 297. But see *ante*, § 86.

[7] Richardson *v.* Vermont, etc., R. Co., 44 Vt. 613; Cunningham *v.* Vermont, etc., R. Co., 12 Gray (Mass.) 411; McLaughlin *v.* Detroit, etc., R. Co., 8 Mich. 100; City of Ohio *v.* Cleveland, etc., R. Co., 6 Ohio St. 489; Evansville, etc., R. Co. *v.* City of Evansville, 15 Ind. 395.

that the remaining assets will be insufficient to meet the corporate liabilities.[1] And another company claiming the right of distress for non-payment of toll charges can not obtain an injunction to restrain the payment of dividends.[2] The fact that there is not cash actually on hand or at the banker's to pay the proposed dividend in full,[3] or that certain immaterial errors in calculation are contained in an account honestly made out and published in good faith,[4] is not sufficient to justify the granting of an injunction. And a court of equity will not restrain the payment of a dividend merely upon the ground that the directors have acted in violation of their duties to the public.[5] An injunction will not be granted, it seems, to restrain payment of a dividend already declared without a stronger showing than is required to restrain the declaration of the dividend,[6] though the fact that dividends have been declared is by no means conclusive of the fact that they must be paid. It is generally held that the court will not, in a suit brought by a single shareholder, to which the other shareholders are not made parties, restrain the payment of dividends which have been regularly declared, since it can not, in their absence, interfere with the legal right which the stockholders have acquired to such dividends.[7] But a stockholder may file a bill on behalf of himself and others to enjoin the threatened declaration of a dividend out of the capital stock.[8] It must be shown that a fraud is being perpetrated

[1] Mills *v.* Northern, etc., R. Co., L. R. 5 Chan. 621; Lee *v.* Neuchatel, etc., Co., 58 L. T. R. 553. But see Williams *v.* Boice, 38 N. J. Eq. 364.

[2] South Yorkshire R. Co. *v.* Great Northern R. Co., 9 Exch. 55.

[3] Stringer's Case, L. R. 4 Chan. 475.

[4] Yool *v.* Great Western R. Co., 20 L. T. R. (N. S.) 74.

[5] Browne *v.* Monmouthshire R., etc., Co., 13 Beav. 32; Stevens *v.* South Devon R. Co., 9 Hare 313.

[6] Carpenter *v.* New York, etc., R. Co., 5 Abb. Prac. (N. Y.) 277; Carlisle *v.* Southeastern R. Co., 1 Macn. & G. 689.

[7] Fawcet *v.* Laurie, 1 Drew & S. 192; Carlisle *v.* Southeastern R. Co., 1 Macn. & G. 689; Carpenter *v.* New York, etc., R. Co., 5 Abb. Pr. 277.

[8] 2 Beach on Private Corporations, § 607; Carlisle *v.* Southeastern Ry. Co., 1 Macn. & G. 689, 14 Jur. 515; Fawcet *v.* Laurie, 1 Drew & S. 192; Macdougall *v.* Jersey, etc., Co., 2 Hem. & M. 528; Bloxam *v.* Metropolitan R. R. Co., L. R. 3 Ch. 337; Salisbury *v.* Metropolitan Ry. Co., 38 L. J. Ch. 249; Painsville, etc., R. Co. *v.* King, 17 Ohio St. 534; Carpenter *v.* New York, etc., R. R. Co., 5 Abb. Pr. (N. Y.) 277. See,

upon citizens of the state in which the suit is brought, before its courts will enjoin the declaration of a dividend by a corporation of another state.[1] But it has been held that the court will not refuse to restrain the corporation from paying a dividend to the common shareholders to the injury of resident holders of preferred shares upon which dividends have not been paid, even though the defendant corporation has its domicile in another state.[2]

§ 318. **Personal liability of directors.**—In addition to their liability as stockholders, the directors have been held personally liable to refund dividends paid out of the capital stock,[3] at least where they have acted willfully and knowingly,[4] and they have been denied recourse upon the stockholders who took the dividends in good faith.[5] It has been said that, "'Where directors order dividends to be paid where no profits have been made, without expressly saying so, a gross fraud is practiced, and the directors are not only civilly liable to those whom they have deceived and injured, but are guilty of conspiracy, for which they are liable to be prosecuted and punished.'"[6] But the better rule would seem to be that they are not liable beyond their liability as stockholders, where they have

also, March *v.* Eastern R. R. Co., 40 N. H. 548, s. c. 77 Am. Dec. 732. But the bill must show that injury will result from the illegal act. Chaffee *v.* Rutland R. R. Co., 55 Vt. 110; Carlisle *v.* Southeastern Ry. Co., *supra*. An injunction has also been granted to restrain the payment of a dividend out of earnings necessary to repair the road. Davidson *v.* Gillies, 1 Am. & Eng. R. R. Cas. 595, note. See, also, Dent *v.* London, etc., Co., L. R. 16 Ch. Div. 344, s. c. 1 Am. & Eng. R. R. Cas. 592.

[1] Howell *v.* Chicago etc., R. Co., 51 Barb. (N. Y.) 378. See, also, Williston *v.* Michigan Southern, etc., R. R. Co., 13 Allen (Mass.) 400; Berford *v.* New York, etc., Co., 56 N. Y. Super. Ct. 236, 4 N. Y. Supp. 836.

[2] Prouty *v.* Michigan Southern, etc., R. Co., 1 Hun (N. Y.) 655. But see Williston *v.* Michigan Southern, etc., R. Co., 13 Allen (Mass.) 400.

[3] Gratz *v.* Redd, 4 B. Mon. (Ky.) 178, 194; Hill *v.* Frazier, 22 Pa. St. 320. See, also, Evans *v.* Coventry, 25 L. J. Ch. 489, 8 De Gex, M. & G. 835; *In re* National Funds, etc., Co., L. R. 10 Ch. Div. 118.

[4] Burnes *v.* Pennell, 2 H. L. Cas. 497, 513.

[5] *In re* Exchange Banking Co., L. R. 21 Chan. Div. 519.

[6] Lord Campbell in Burnes *v.* Pennell, 2 H. L. Cas. 497, 513.

acted in good faith ;[1] or, if they are held liable, they may, perhaps, recover what they have paid in an action against the stockholders.[2] A suit to enforce this liability has been held to be properly brought by a non-participating stockholder.[3] But a stockholder seeking to hold the directors personally liable for damages which he has sustained by reason of their fraud and mismanagement, should bring his suit in a court of equity.[4] At law, in the absence of special statute, the directors are responsible only to the corporation.[5] It is, however, provided by statute in many of the states that the directors declaring and paying any dividend which impairs the capital stock shall be individually liable for the corporate debts,[6] or for some other stated penalty, such as double damages, fine or imprisonment. It has been held that where recovery is had from a director as a wrong-doer under such a statute,[7] he can have no right of subrogation as against the corporation.[8] And a claim based on such a statute[9] against a director who has acted in good faith, may, it seems, be barred by laches.[10]

[1] Excelsior Pet. Co. *v.* Lacey, 63 N. Y. 422.

[2] Salisbury *v.* Metropolitan R. Co., 22 L. T. R. (N. S.) 839.

[3] Salisbury *v.* Metropolitan R. Co., 22 L. T. R. (N. S.) 839. In Lexington, etc., R. Co. *v.* Bridges, 7 B. Mon. (Ky.) 556, 559, it is suggested that such a suit would be more properly brought by the stockholders, or by the corporation, and the court doubts if the directors can be held liable to the corporate creditors, but it may well be doubted if the stockholders retaining their dividends could have any standing in a court of equity to prosecute such a suit, and the creditors would seem to have the strongest claim in equity to some remedy for an impairment of the fund upon the faith of which the debts are created.

[4] Smith *v.* Hurd, 12 Met. (Mass.) 371; Bishop *v.* Houghton, 1 E. D. Smith (N. Y.) 566; Sears *v.* Hotchkiss, 25 Conn. 171.

[5] Smith *v.* Poor, 40 Me. 415; Evans *v.* Brandon, 53 Tex. 56; Allen *v.* Curtis, 26 Conn. 456. And, of course, a stockholder who has received a dividend wrongfully and illegally declared will not be allowed to maintain an action for his own benefit, from the directors who illegally declared it, on the theory of a breach of trust. Wallace *v.* Lincoln Savings Bank, 89 Tenn. 630, s. c. 24 Am. St. R. 625.

[6] Stimson's Am. Stat. (1892), §§ 8161, 8236, 8634. See Companies' Act of 1862 (Eng.), § 165.

[7] Pennsylvania Act of 7th of April, 1849, § 9.

[8] Hill *v.* Frazier, 22 Pa. St. 320.

[9] Eng. Companies' Act of 1862, § 165.

[10] *In re* Mammoth Copperopolis, etc., 50 L. J. Chan. 11.

§ 319. **Dividends payable in scrip.** — Dividends are frequently made payable in "scrip" or certificates which confer upon the holder certain rights, which are set out in the certificates themselves. This plan is adopted when the profits of the company are in the shape of property which has yet to be sold, or when the profits are being used in making improvements to be represented by a stock dividend, which is to be declared at some time in the future. The certificates are made redeemable in money, stock, bonds, or property, either at a fixed time or at the option of the corporation[1] or of the holder,[2] and, being negotiable, enable the stockholders who wish to do so, to realize at once upon the dividend. Sometimes these certificates so far partake of the nature of certificates of stock as to entitle the holder to dividends.[3] But the issue of such certificates is not a distribution of the surplus from which the corporation expects to pay them, and does not transfer the title to that surplus to the holders of certificates.[4] The company may, however, distribute the property of which its surplus income consists among its stockholders in the form of a dividend, where it is susceptible of a ratable distribution;[5] or it may declare a dividend payable in bonds which represent earnings used for the improvement of the road.[6]

§ 320. **Stock dividends.**—If the earnings of the company have been devoted to the purchase of shares of stock made under legislative authority, the shares so purchased may be distributed to the stockholders in the form of a stock dividend,[7] unless such dividends are prohibited by statute. A stock

[1] Brown *v.* Lehigh, etc., Co., 49 Pa. St. 270.

[2] Chaffee *v.* Rutland R. Co., 55 Vt. 110; State *v.* Baltimore, etc., R. Co., 6 Gill (Md.) 363; Brundage *v.* Brundage, 1 Th. & C. (N. Y.) 82, affirmed, 60 N. Y. 544.

[3] Bailey *v.* Railroad Co., 22 Wall. (U. S.) 604.

[4] People *v.* Board of Assessors, 76 N. Y. 202, 16 Hun 196; Commonwealth *v.* Pittsburg, etc., R. Co., 74 Pa. St. 83; Bailey *v.* Railroad Co., 22 Wall. (U. S.) 604.

[5] Scott *v.* Central R., etc., Co., 52 Barb. (N. Y.) 45, where the dividends were paid in Confederate money.

[6] Wood *v.* Lary, 47 Hun (N. Y.) 550; State *v.* Baltimore, etc., R. Co., 6 Gill (Md.) 363.

[7] Commonwealth *v.* Boston, etc., R. Co., 142 Mass. 146, s. c. 7 N. E. R. 716. But the stockholders have no right to claim a *pro rata* share of such stock

dividend has been defined as "the issue by a corporation, as a dividend, of new shares which have been paid up by the transfer from the surplus or profit and loss account to the account representing capital stock of a sum equal to their par value."[1] The effect of such a dividend is, it seems, simply to change the form of the investment of the stockholders by increasing the number of shares and thereby diminishing the value of each without affecting the solvency of the corporation or altering the aggregate value of the shares or interests of the stockholders.[2] It may, therefore, be made not only where old shares have been purchased by the corporation, but also where the corporation is authorized to increase its stock and issue new shares and a surplus has been earned, so that the new stock represents and has back of it so much additional capital or property which the directors might have distributed among the stockholders or retained for future use.[3] Insomuch as the stock dividend consisting of new shares virtually takes the place of a cash dividend, each shareholder is, ordinarily, entitled to share therein to the same extent as if it were paid in cash, and all should, therefore, be given an equal opportunity to take their proportionate shares of the new stock in the first instance.[4] But it is said that stockholders in railroads

until it is ordered to be divided among them. Wiltbank's Appeal, 64 Pa. St. 256; St. John *v.* Erie R. Co., 10 Blatch. (U. S.) 271; Bradley *v.* Holdsworth, 3 M. & W. 422.

[1] "Stock Dividends and their Restraint," 7 Am. Bar Assn. R. 268; note to Gordon's Exrs. *v.* Richmond, etc., R. R. Co., 78 Va. 501, 22 Am. & Eng. R. R. Cas. 33, 48.

[2] Williams *v.* Western Union Tel. Co., 93 N. Y. 162; Howell *v.* Chicago, etc., R. R. Co., 51 Barb. (N. Y.) 378; Terry *v.* Eagle Lock Co., 47 Conn. 141; Gibbons *v.* Mahan, 136 U. S. 549, s. c. 10 Sup. Ct. R. 1057.

[3] Morawetz on Private Corporations, §§ 452, 453; Rand *v.* Hubbell, 115 Mass. 461; Commonwealth *v.* Pittsburg, etc., R. R. Co., 74 Pa. St. 83; Kenton Furnace, etc., Co. *v.* McAlpin, 5 Fed. R. 737.

[4] Morawetz on Private Corporations, §§ 454, 455; Jones *v.* Morrison, 31 Minn. 140; Jones *v.* Terre Haute, etc., R. R. Co., 57 N. Y. 196; Dousman *v.* Wisconsin, etc., R. R. Co., 40 Wis. 418. It has been held that the corporation may give the stockholders the privilege of taking new stock, when the capital stock is increased, at par, or less than par, although it may be worth more. Moss's Appeal, 83 Pa. St. 264; Wiltbank's Appeal, 64 Pa. St. 256. As to the rights of holders of preferred stock, see Gordon's Exrs. *v.* Richmond, etc., R. Co., 78 Va. 501, s. c. 22 Am. & Eng. R. R. Cas. 33; Phil-

and other corporations, whose powers and duties are defined by statute, have no right to claim shares of new stock, upon any terms, in preference to others desiring to become owners of such stock, unless this privilege is expressly conferred upon them in some manner equivalent to a declaration of a dividend.[1] In our opinion, however, there is no good reason for distinguishing between railroad companies and other corporations whose stockholders have been held to have the first right to take the new shares, unless there is something requiring it in the charter, statute, or by-laws of the particular corporation.[2] And when the capital stock of a company has been lawfully reduced, the property thus deducted from the capital may be distributed as a dividend.[3] Where no special provision is made to the contrary, a dividend is presumed to be payable in cash, and in lawful or current money.[4] And a company can not show that a dividend was payable only in bank bills passing at a discount, if it has not distinctly said so in the resolution declaring it.[5]

§ 321. **Dividends payable without discrimination.**—A dividend must be payable equally to all stockholders of the same class, and the directors can not discriminate either as to the proportional size of the dividends[6] or as to the manner or time

lips *v.* Eastern R. R. Co., 138 Mass. 122.

[1] 1 Wood on Railroads, § 72; Miller *v.* Illinois Cent. R. Co., 24 Barb. (N. Y.) 312; Curry *v.* Scott, 54 Pa. St. 270; Ohio Ins. Co. *v.* Nunnemacher, 15 Ind. 294.

[2] 1 Rorer on Railroads, 208; Gray *v.* Portland Bank, 3 Mass. 364; Cunningham's Appeal, 108 Pa. St. 546; Reese *v.* Bank of Montgomery Co., 31 Pa. St. 78; State, *ex rel.* Page, *v.* Smith, 48 Vt. 266; Eidman *v.* Bowman, 58 Ill. 444.

[3] Strong *v.* Brooklyn, etc., R. Co., 93 N. Y. 426, 435; Parker *v.* Mason, 8 R. I. 427.

[4] Ehle *v.* Chittenango Bank, 24 N. Y. 548; Scott *v.* Central R., etc., Co., 52 Barb. (N. Y.) 45, where the income of the corporation was Confederate money only, but the legal effect of the resolution was held to be that the dividends were payable in lawful money of the United States.

[5] Ehle *v.* Chittenango Bank, 24 N. Y. 548, where the dividend was declared to be payable in "New York state currency.' '

[6] Ryder *v.* Alton, etc., R. Co., 13 Ill. 516; Painesville, etc., R. R. Co. *v.* King, 17 Ohio St. 534; Howell *v.* Chicago, etc., R. Co., 51 Barb. (N. Y.) 378; Hale *v.* Republican Riv. Bridge Co., 8 Kan. 466; State *v.* Baltimore, etc., R. Co., 6 Gill (Md.) 363; Jackson's

of payment,[1] or as to the medium of payment, as by paying a part of the stockholders in gold and forcing the others to accept depreciated paper at its face value,[2] because a portion of the stock is unpaid,[3] or because certain stockholders own a greater number of shares than others,[4] or because the stock held by part of the stockholders was issued after that held by others, even though it was not issued until after the dividend was earned, provided it was issued before the dividend was declared.[5] The stockholders may restrain an unequal or unfair distribution of the profits of the company by bill in equity,[6] or they may, perhaps, sue at law as for a breach of the implied contract to distribute the profits ratably.[7]

Admrs. *v.* Newark Plank Road Co., 31 N. J. Law 277; Atlantic, etc., Tel. Co. *v.* Commonwealth, 3 Brewst. (Pa.) 366; Harrison *v.* Mexican R. Co., L. R. 19 Eq. 358; Coey *v.* Belfast, etc., R. Co. (Irish R.), 2 C. L. 112; March *v.* Eastern R. R. Co., 43 N. H. 515.

[1] State *v.* Baltimore, etc., R. Co., 6 Gill (Md.) 363; Jones *v.* Terre Haute, etc., R. Co., 57 N. Y. 196.

[2] State *v.* Baltimore, etc., R. Co., 6 Gill (Md.) 363; Keppel's Admr. *v.* Petersburg, etc., R. Co., Chase's Dec. (U. S.) 167.

[3] Oakbank, etc., Co. *v.* Crum, L. R. 8 App. Cases 65; Reese *v.* Bank, etc., 31 Pa. St. 78. But the dividend so declared may generally be applied by the corporation toward extinguishing the shareholder's indebtedness for his stock. King *v.* Paterson, etc., R. Co., 29 N. J. L. 504. That it may be so applied by agreement, see Kenton, etc., Co. *v.* McAlpin, 5 Fed. R. 737.

[4] State *v.* Baltimore, etc., R. Co., 6 Gill (Md.) 363; Jones *v.* Terre Haute, etc., R. R. Co., 57 N. Y. 196.

[5] Jones *v.* Terre Haute R. Co., 57 N. Y. 196; Jermain *v.* Lake Shore, etc., R. Co., 91 N. Y. 483; Phelps *v.* Farmers', etc., Bank, 26 Conn. 269.

[6] Luling *v.* Atlantic, etc., Ins. Co., 45 Barb. (N. Y.) 510. In case of a fraudulent over-issue of stock, payment of dividends may be enjoined until it is ascertained who are the true holders of genuine stock. Underwood *v.* New York, etc., R. Co., 17 How. Prac. 537. See, also, Burnes *v.* Pennell, 2 H L. Cas. 497; Painesville, etc., R. R. Co. *v.* King, 17 Ohio St. 534.

[7] Such an action was sustained in New Jersey. Jackson's Adm'r *v.* Newark Plank-Road Co., 31 N. J. Law 277.

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